Supreme Court, U.S.
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No. 92-1541

IN THE

Supreme Court of the United States

October Term, 1992

LILLIAN McCOVEY SHERMOEN, *et al.*,
Petitioners.

v.

UNITED STATES OF AMERICA, *et al.*,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Could the district court decide the constitutionality of the Hoopa-Yurok Settlement Act of 1988 in a suit against the United States, when the Act requires that such challenges be filed in the United States Court of Federal Claims and when Indian tribes that obtained vested property rights and governmental authority by the Act were not also parties?

2. Does a public rights exception to usual rules of joinder under Fed. R. Civ. P. 19 permit a constitutional challenge by competing claimants under a federal statute to be decided in the absence of Indian tribes that obtained vested property rights and governmental authority under that statute?

3. Does Indian tribal sovereign immunity prevent a suit against tribal officials when only equitable relief is sought to void a statute's vesting of property rights and governmental authority in tribes, and when plaintiffs' claims are not causally connected to any action of a tribal official?

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BRIEF IN OPPOSITION TO CERTIORARI

Respondents Dale Risling, Sr., Robert D. Hostler, Clifford Lyle Marshall and John M. Scott oppose the requested writ of certiorari in this unique case. Petitioners' claims belong in, and will be resolved by, two actions pending in the United States Court of Federal Claims,[1] *Ammon v. United States*, No. 91-1432L, and *Yurok Indian*

[1] Pursuant to the Federal Courts Administration Act of 1992, Pub. L. No. 102-572, 106 Stat. 4506, the United States Claims Court was renamed the United States Court of Federal Claims. That court will be referred to as the "claims court" herein.

Tribe v. United States, No. 92-173L. *See* Petition ("Pet.") 6 n.4.[2/] Those actions will be reviewable later.

RULES, CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. Fed. R. Civ. P. 19 (reproduced at petitioners' appendix C ("Pet. App.").

2. U.S. Const. art. I, § 8, cl. 3, and Amendments I and V. Pet. 2.

3. The Hoopa-Yurok Settlement Act, as amended, 25 U.S.C. §§ 407, 1300i *et seq.*, and 16 U.S.C. § 460ss-3. The portions of the Act codified at 25 U.S.C. §§ 1300i *et seq.* are reproduced in Pet. App. D. Petitioners omit the portions of the Act codified elsewhere; these are reproduced in Hoopa respondents' appendix A ("Resp. App."), *infra*.

STATEMENT

I. Nature of the Case. In northwestern California, 45 miles up the mighty Klamath River, the Trinity River enters the Klamath. There lies the Yurok/Hoopa reservation boundary, just at a point where the traditional territories, languages and cultures of several distinct Indian tribes intersect. This suit is about Congress' latest effort to settle the physical and political boundary at that point.

By executive order in 1855, President Pierce established the Klamath River Reservation along the lower

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[2/] These cases were recently consolidated as *Karuk Tribe of California v. The United States*, Fed. Cl. Nos. 90-3993L, 91-1432L and 92-173L, before the Honorable Lawrence S. Margolis, Judge, United States Court of Federal Claims.

twenty miles of the Klamath River. However, the Hoopas and other tribes refused to move to that reservation. In 1864, Congress authorized establishment of four reservations, one of which enclosed Hoopa Valley on the lower twelve miles of the Trinity River. Without the knowledge of the Indians, in 1891 by executive order, President Harrison joined the two tribal reservations, thereby also reserving a 25-mile strip of land in between. In 1958 the Interior Department defined the rights of the Indians of the joint reservation. 1 Ops. of the Solicitor 1814, 65 I.D. 59 (1958). The joinder of the Yurok and Hoopa reservations has been fiercely contested at every level of the federal court system since. The petition here seeks to continue the fight.

In 1963, Yurok Indians, later joined by nearly 4,000 plaintiffs, filed *Short v. United States*, Fed. Cl. No. 102-63, leading to a liability ruling, 202 Ct. Cl. 870, 486 F.2d 561 (1973), *cert. denied*, 416 U.S. 961 (1974), and hundreds of additional orders, opinions and lawsuits. Neither judges nor the Federal Mediation Service proved able to resolve the ancient feud over allocation and management of the Indian assets and benefits in the decades that followed. Significantly, in 1988, a federal district court concluded that the applicable 1864 Act of Congress did not delegate territorial management power to any Indian tribes. Congress filled the resulting void.

The Hoopa-Yurok Settlement Act of 1988 ("Settlement Act") was shaped through extensive congressional hearings, two each in the House and in the Senate, in which all sides (including several petitioners here and their counsel) fully participated.[3/] There was tremendous Yurok

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[3/] *See* Hearing Before the Comm. on Interior and Insular Affairs, House of Representatives, 100th Cong., 2d Sess., on H.R. 4469, Serial No. 100-75 (June 21, 1988); Hearing Before the Select Comm. on Indian

Indian as well as Hoopa Indian support for the legislation. Petitioners impugn Congress' motive, saying: "The Act's basic purpose was to benefit the Hoopa Valley Tribe with property and funds." Pet. 4. However, the Senate reported that: "The intent of this legislation is to bring the Hoopa Valley Tribe and the Yurok Tribe within the mainstream of federal Indian law." *Partitioning Certain Reservation Lands between the Hoopa Valley Tribe and the Yurok Indians [etc.]*, S. Rep. 100-564, 100th Cong., 2d Sess. at 2 (1988) (hereinafter "S. Rep. 100-564") (reproduced in respondents' Appendix B at 6a). The Settlement Act responds to the absence of clear property rights in any tribes or Indians, the judicially declared restrictions on federally recognized Indian tribes with respect to reservation management, and the continuing interference with organizational efforts of the Yurok Indian Tribe stemming from the still-pending *Short v. United States* claims litigation.

II. Course of Proceedings. On August 28, 1990, Lillian Shermoen and her fellow petitioners, who are also plaintiffs in *Short v. United States*, Fed. Cl. No. 102-63 (or their minor children),[4/] and the Coast Indian Community of the

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Affairs, U.S. Senate, 100th Cong., 2d Sess., on Oversight Hearing on Hoopa-Yurok Indian Reservation, S. Hrg. 100-946 (June 30, 1988); Hearing Before the Select Comm. on Indian Affairs, U.S. Senate, 100th Cong., 2d Sess., on S. 2723, S. Hrg. 100-949 (September 14, 1988); Hearing Before the Subcomm. on Admin. Law & Governmental Relations of the Comm. on the Judiciary, House of Representatives, 100th Cong. 2d Sess., on H.R. 4469, Serial No. 100-77 (September 30, 1988).

[4/] In the district court *Shermoen* included 70 individual plaintiffs, 67 of whom are also plaintiffs in *Short v. United States*. The remaining three are children of *Short* plaintiffs. As discussed below, all but one *Shermoen* plaintiff qualified for and were included upon the Settlement Roll. *See* 56 Fed. Reg. 12062 (March 21, 1991). The non-qualified *Shermoen* plaintiff is *Short* plaintiff Carol Leigh Ammon. As noted, Pet. ii, three *Shermoen* plaintiffs are now deceased. Thus of 67 individual petitioners, 65 are *Short* plaintiffs and the remaining two are minor

Resighini Rancheria, filed suit to nullify the whole Settlement Act. CR #7 at 28.[5/] Without objection, four individual Hoopa tribal members ("Hoopa respondents") intervened to assert their individual claims.

The parties fully briefed the merits of Shermoen's complaint. On November 30, 1990, Hoopa respondents moved to dismiss the action under Fed. R. Civ. P. 12(b)(1), (6) and (7), arguing that exclusive subject matter jurisdiction was vested in the claims court by 25 U.S.C. § 1300i-11, that the complaint failed to state a claim upon which relief can be granted, and that the Hoopa Valley and Yurok Tribes were absent indispensable parties. Federal defendants sought dismissal on narrower grounds. At the district court's behest, all issues were thoroughly briefed and submitted on the merits.

On May 23, 1991, the district court dismissed all of plaintiffs' claims. Pet. App. 17a. The district court chose not to address the merits relying instead on failure to join indispensable parties who possessed sovereign immunity. Under Rule 19(a), the court determined that while it could grant complete relief to existing parties, the absent tribes had legally protected interests in the litigation. The court said:

> There is no question that the Act creates certain legally protected interests in the absent parties. For example, the Act authorizes the creation of the Yurok Tribe. The Act then grants certain property rights to the newly formed Yurok Tribe, as well as to the existing Hoopa Valley Tribe.[fn] It is

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children of *Short* plaintiffs.

[5/] "CR" record citations are to the district court's docket entries.

> equally clear that an order of this Court declaring the Act unconstitutional would adversely impact the rights granted to the absent parties by the Act. Thus, plaintiffs' protestations aside, there is no question that the absent parties do have legally protected interests in the outcome of this litigation. The Court next must determine whether these rights will be impaired or impeded by this litigation. *Makah* [*Indian Tribe v. Verity*], 910 F.2d [555,] at 558 [(9th Cir. 1990)]. The Court finds that any such rights undoubtedly will be impaired by this litigation.
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>
> [fn] Plaintiffs argue that the Hoopa Valley Tribe should be considered a party to this litigation because certain members of the Tribe are parties. But it is quite clear that the Hoopa Valley Tribe members who are present are appearing in their individual capacities and not as representatives of the tribe.

Pet. App. 21a.

The district court concluded that the absent tribes' interests could not be adequately represented by the United States, which has conflicting duties to a number of tribes. The court found that the Act granted certain property rights in the former joint reservation to absent tribes, stating:

> Plaintiffs seek the return of lands that they contend are unconstitutionally taken by the terms of the Act. This is not a situation where plaintiffs merely seek monetary relief

> to compensate them for what they contend is an unconstitutional taking; rather, this is an equitable action in which plaintiffs seek to have the land itself returned. Any relief granted to them by the Court would necessarily involve taking away interests in the Hoopa Valley given to the absent tribes by the terms of the Act.

Pet. App 25a. The court concluded that the absent tribes were indispensable to plaintiffs' suit to void the entire Settlement Act.

On June 12, 1991, plaintiffs moved to modify the court's dismissal on the ground that they could "correct the defect in parties and resume their attack on the Settlement Act by joining tribal officials as defendants." CR #92. Petitioners also moved for permission to file a second amended complaint that purported to add as defendants the Yurok Tribe, the Yurok Interim Council, the Hoopa Valley Business Council as a body, and all individual Hoopa Tribal Council members. Both motions were heard by the district court and denied on July 10, 1991. Pet. App. 29a.

On July 16, 1991, petitioners made an emergency motion under Ninth Circuit Rule 27-3 seeking an injunction barring implementation of the Settlement Act pending appeal. Specifically, petitioners sought to bar the Bureau of Indian Affairs from employing July 19, 1991 as the date for persons on the Settlement Roll to elect among the options of the Act, discussed below. The Court of Appeals denied the request. As a result, over 2,900 persons elected Yurok membership, and some 700 chose the lump sum payment option. Those persons received the payments accompanying their selected option and thereby waived claims arising under the Act. 25 U.S.C. § 1300i-5(c)(4); -5(d)(3). Pet. App. 44a. *See Heller, Ehrman, White &*

McAuliffe v. Babbitt, ___ F.2d ___, 1993 WL 158142, Nos. 92-5003 and 92-5004 (D.C. Cir. May 18, 1993).

On September 16, 1991, 32 plaintiffs, including 20 of the appellants here, filed an action in the claims court, *Ammon v. United States*, No. 91-1432L. *Ammon* seeks compensation for the Settlement Act's alleged taking of enumerated rights protected by the Fifth Amendment. Plaintiffs in *Ammon* act for themselves and on behalf of a group that includes each individual petitioner in this Court.

On September 14, 1991, the Bureau of Indian Affairs conducted the general council meeting of eligible voters of the Yurok Tribe, pursuant to 25 U.S.C. § 1300i-8(c)(2), Pet. App. 46a, and received over 90 nominations for the Yurok Interim Council. At an election conducted on October 25, 1991, five candidates were selected to serve as the Yurok governing body. Three of the petitioners here are among the elected Yurok Interim Council members: Dorothy Haberman, Richard Haberman and Maria Tripp. Under the proposed Second Amended Complaint they would be defendants as well as plaintiffs.

On March 11, 1992, the Yurok Indian Tribe filed an action in the claims court, *Yurok Indian Tribe v. United States*, No. 92-173L. The Yurok Tribe sued on its own behalf and on behalf of its members, 63 of whom are also petitioners here. However, despite petitioners' domination of the Yurok Indian Tribe's governing body, the Tribe chose not to waive its sovereign immunity or otherwise intervene in the *Shermoen* proceeding.

On December 24, 1992, the Court of Appeals, unanimously affirmed the district court's rulings and reasoning. Pet. App. A.

III. Outline of the Hoopa-Yurok Settlement Act. The portion of the Act codified at 25 U.S.C. §§ 1300i *et seq.*, as

amended, is reproduced in Pet. App. D at 33a-51a. The remainder is in Hoopa respondents' Appendix A, *infra*.

Section 2 of the Settlement Act, 25 U.S.C. § 1300i-1, provides for partition of the Joint Reservation into the new Hoopa Valley Reservation and the Yurok Reservation, conditioned upon a Hoopa Valley Tribe waiver of certain claims, including claims to the Yurok Reservation. The Hoopa Valley Tribe enacted the requisite waiver. 53 Fed. Reg. 49361 (December 7, 1988). Yurok Reservation property is similarly conditioned upon a waiver which will soon be enacted (or rejected) by the Interim Council of the Yurok Tribe. Petitioners distort the relative resources of the Hoopa Valley and Yurok reservations by, among other things, ignoring fisheries and tens of thousands of acres on the Yurok Reservation that remain Indian country. *Compare* S. Rep. 100-564 at 6, Resp. App. 13a, *with Mattz v. Arnett*, 412 U.S. 481, 483-84 (1973); *see also Oklahoma Tax Comm'n v. Sac & Fox Nation*, 508 U.S. ___, 1993 WL 155656, No. 92-259 (May 17, 1993).

Section 4 of the Settlement Act, 25 U.S.C. § 1300i-3, establishes a fund comprising all Hoopa or Yurok trust funds in existence as of the date of the Act, about $65 million, plus $10 million in federal appropriations. The tribes' shares were determined by the proportion of the Indians who affiliated with that tribe. Until the fund was divided on April 12, 1991, both the Hoopa Valley Tribe and Yurok Transition Team took "advances" from it; these were deducted from the tribes' shares.

Section 5 of the Act, 25 U.S.C. § 1300i-4, directs the Bureau of Indian Affairs ("BIA") to prepare a settlement roll using eligibility criteria established for Indians of the Reservation in *Short v. United States* ("*Short III*"), 719 F.2d 1133 (Fed. Cir. 1983), *cert. denied*, 467 U.S. 1256 (1984). A 1990 amendment permits the Yurok Transition Team and the Hoopa Valley Tribe to advise the Secretary on factual

matters. With respect to *Short* plaintiffs (including 67 of petitioners here), the Bureau of Indian Affairs must follow the court's decisions on eligibility, but others qualify if the Secretary finds they can meet the court's eligibility standards. The Settlement Roll appeared in the Federal Register on March 21, 1991. 56 Fed. Reg. 12062. The official list contained 3,020 names; since then, the roll has increased to 3,672. Sixty-nine of the individual petitioners are included in the Settlement Roll; the remaining petitioner was held unqualified in the *Short* case, where she has a right to appeal.

All persons on the Settlement Roll choose among the settlement options offered by the Act. *See* 25 U.S.C. § 1300i-5(a). Pet. App. 41a. The Act establishes three choices: Hoopa tribal membership, Yurok tribal membership, or receipt of a lump sum payment in lieu of membership in either tribe. Contrary to petitioners' assertion that the options "forced them to associate for political purposes in ways that they did not choose," Pet. 10, the Act merely offers monetary and usufructuary incentives with each choice. The Hoopa Tribal Membership Option is restricted to certain residents or property owners born by October 1, 1949, who satisfy criteria in an opinion in *Short v. United States*. 25 U.S.C. § 1300i-5(b)(1). The Yurok Tribal Membership Option is available, together with a $5,000 payment ($7,500 for persons over 50), to any person on the Settlement Roll. Yurok membership must be chosen by minors unless that would violate enrollment laws of an Indian tribe. 25 U.S.C. §§ 1300i-5(a)(3), 1300i-5(c). The Lump Sum Payment Option provides an award of $15,000 in lieu of membership in either the Hoopa Valley or Yurok Tribes or rights in those tribes' reservations. 25 U.S.C. § 1300i-5(d). However, opting for the lump sum payment has no effect on persons' membership in other tribes nor does it terminate their Indian status. S. Rep. 100-564 at 24-25, Resp. App. 42a.

Each of the three Settlement Options that may be affirmatively chosen under 25 U.S.C. § 1300i-5 is accompanied by a waiver of claims the individual might have to tribal, communal, or unallotted land, property, resources, or rights of the other tribe or tribes. Persons on the Settlement Roll who do not affirmatively elect one of the statutory options, and some petitioners initially did not, are specially treated. In essence, 25 U.S.C. § 1300i-5(a)(4)(B) establishes a presumption that such persons have elected the Yurok Tribal Membership Option, together with accompanying benefits and burdens, but the presumption is rebutted if the monetary payment is rejected. S. Rep. 100-564 at 23, Resp. App. 39a-40a.

Sections 8 and 9 of the Act, 25 U.S.C. §§ 1300i-7, 8, Pet. App. 45a-48a, address tribal government. Section 8 ratifies and confirms the governing documents of the Hoopa Valley Tribe. Section 9 establishes a Yurok Transition Team, appointed by the Secretary of the Interior. The successor Interim Council of the Yurok Tribe, three of whose members are petitioners here, was elected in 1991 by those who chose Yurok membership. Section 10, 25 U.S.C. § 1300i-9, provides for submission of a plan for Yurok economic self-sufficiency.

Section 11 of the Act, 25 U.S.C. § 1300i-10, Pet. App. 49a, gives to three federally recognized Indian tribes, known as Rancherias, many of whose members are of Yurok origin, the option to merge with the Yurok Tribe if they so choose. No tribes were required to merge. Petitioner Coast Indian Community of the Resighini Rancheria voted to remain separate from the Yurok Tribe. Sections 12 and 13 address fisheries of the Karuk Tribe and Yurok Tribe and reservation timber sales. These sections are codified at 16 U.S.C. § 460ss-3 (West 1993) and 25 U.S.C. § 407 (West 1993), respectively. Resp. App. 1a-2a.

Section 14 of the Act, 25 U.S.C. § 1300i-11, Pet. App. 50a, establishes statutes of limitations for various claims arising under the Act. It also directs that challenges to the Act as a taking under the Fifth Amendment of the United States Constitution "or as otherwise having provided inadequate compensation shall be brought . . . in the United States Court of Federal Claims." This is the court in which *Short v. United States*, and related cases, have been pending for over 30 years.

SUMMARY OF ARGUMENT

This case is a poor vehicle for construing Fed. R. Civ. P. 19 because of its unique jurisdictional and sovereign immunity context. If Rule 19 needs modification, an amendment is preferable to a judicial gloss.

Since petitioners do not challenge the immunity of the absent Indian tribes, this case is also unsuitable for refining this Court's recent opinions concerning tribal sovereign immunity. Congress designated the claims court as the sole forum for those aggrieved by this complex readjustment of Indian property rights. Thus, this case presents no issue concerning the amenability to suit of Indian tribal officials because petitioners are not injured by any action of an Indian tribal official.

I. The Question Whether Judicial Review of Statutes Addressing Indian Tribes' Property Can Be Denied Is Not Ripe. Congress expressly provided a forum for challenges to the Hoopa-Yurok Settlement Act: 25 U.S.C. § 1300i-11(a), Pet. App. 50a. Because petitioners and others are litigating their grievances in the United States Court of Federal Claims this case does not squarely present the preclusion of review issues suggested by the Petitioners' Questions Presented. Until the possibility of relief in the claims court has been exhausted, injunctive and declaratory relief under these circumstances is not available. *Preseault*

v. Interstate Commerce Comm'n., 494 U.S. 1 (1990); *Ruckleshaus v. Monsanto Co.*, 467 U.S. 986 (1984).

The Court of Federal Claims has jurisdiction of "any claim against the United States founded either upon the Constitution, or any Act of Congress. . . ." 28 U.S.C. § 1491(a)(1). Congress' reference to the Claims Court forum here is broadly worded.[9] In *Heller, Ehrman, White & McAuliffe v. Babbitt*, ___ F.2d ___, 1993 WL 158142, Nos. 92-5003 and 92-5004 (D.C. Cir. May 18, 1993), the Court of Appeals dismissed a suit to enforce an implied lien against the Hoopa-Yurok Settlement Fund noting, with respect to 25 U.S.C. § 1300i-11(a):

> [T]his section does not limit the jurisdiction of the Claims Court to suits involving certain parties or seeking certain relief. The statute makes clear that "any claims" challenging the distribution of money and property under HYSA "shall be brought" in the Claims Court.

Id., slip op. at 7-8.

Each individual petitioner in this case is also a claimant in *Ammon v. United States*, Fed. Cl. No. 91-1432L, and most (the 63 petitioners who chose Yurok membership) are also represented in *Yurok Indian Tribe v. United States*, Fed. Cl. No. 92-173L. The Court of Federal Claims has not yet determined the scope of its jurisdiction

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[9] The Settlement Act states: "Any claim challenging the partition of the joint reservation pursuant to section 1300i-1 of this title or any other provision of this subchapter as having effected a taking under the fifth amendment of the United States Constitution or as otherwise having provided inadequate compensation shall be brought, pursuant to section 1491 or 1505 or Title 28, in the United States Court of Federal Claims." 25 U.S.C. § 1300i-11(a) (West 1993).

in these cases, which have not yet reached trial, but its decisions ultimately will be reviewable in this Court.

Whether petitioners here have waived their claims on the merits is also before the Court of Federal Claims. As noted above, 67 of the individual petitioners are also plaintiffs in *Short v. United States*, Fed. Cl. No. 102-63. The United States has pointed out in that case that "all plaintiffs accepted the benefits of the [Hoopa-Yurok Settlement] Act and all waived their claims under the general waiver provision of the Act." Defendant's Reply in Support of the Motion for Summary Judgment Re: Hoopa Valley Tribe's April 15, 1991 Per Capita Distribution at 9-10, *Short v. United States*, Fed. Cl. No. 102-63 (February 8, 1993).

Petitioners distort dictum in the lower court's opinion to speculate that their constitutional arguments can never be heard because of Rule 19. Actually, the court said:

> We realize that our decision effectively denies appellants a forum in which to have some of their grievances heard. This case serves as one more illustration, however, that "Congress' authority over Indian matters is extraordinarily broad, and the role of courts in adjusting relations between and among tribes and their members correspondingly restrained." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 72 (1978). Appellants' relief, if any is available, must be sought in the forum envisioned by Congress--namely, the Court of Claims. *See* 25 U.S.C. § 1300i-11.

Pet. App. 15a.

After full briefing on the merits of all claims, the district court concluded that petitioners seek redetermination of which groups of Indians should have received which assets of the former Joint Reservation. *See* Pet. App. 22a, 25a. The essential nature and effect of petitioners' causes of action is to reallocate Indian property and usufructuary rights. *See Ford Co. v. Dept. of Treasury*, 323 U.S. 459, 464 (1945); *Nero v. Cherokee Nation of Okla.*, 892 F.2d 1457, 1464 (10th Cir. 1989). Petitioners stress the importance of "[a] legally protected land base," Pet. 9, as against acts that "deprive tribes of their land." *Id.* They say the Settlement Act "has diminished petitioners' rights in land." Pet. 10. Even their purported First Amendment claim refers to requiring affiliation "in order to retain their interest and rights in the reservation." Pet. 8 (emphasis added). Each of petitioners' "other constitutional claims" is merely another argument designed to rationalize their requested reallocation of property and usufructuary rights. *Cf.* Pet. 6 n.4. Congress was well aware of the claims court's thirty years of experience with claims concerning the Hoopa Valley Indian Reservation when it directed that judicial review of this Act be had in that forum. S. Rep. 100-564 at 7-8, 12-13, Resp. App. 15a-16a, 22a-24a.

Nor does this case present any application of the political question doctrine, contrary to petitioners' assertion at 10. The lower court made no reference to the continuing role of the political question doctrine. *See Baker v. Carr*, 369 U.S. 186, 215 (1962).

II. A Case Turning on Indian Tribal Sovereign Immunity Is An Inappropriate Context to Address the Scope of Joinder Principles of Fed. R. Civ. P. 19. Petitioners do not contest the fact that the absent Indian tribes possess sovereign immunity and have not waived it. Nor do they explain why, although petitioners hold three out of the five votes on the governing body of the Yurok Indian Tribe, that Tribe has refused to intervene in this case and has

chosen instead to sue in the claims court. Since the claims here seek to reallocate lands, money and governmental power long held for the benefit of Indians and which Congress has now vested in Indian tribes, there can be no doubt that this case seeks to reach sovereign property. *See* S. Rep. 100-564 at 1-2, Resp. App. 5a.

Rule 19 has a special application in suits against a sovereign. For example, in *Idaho ex rel. Evans v. Oregon*, 444 U.S. 380, 390-91 (1980), the Court avoided the conclusion that the United States was an indispensable party because there was no "possibility of prejudice to the United States, either in its role as trustee for the Indians or in its role as manager of the ocean fishery and the dams." Professor Moore puts it this way:

> The point to be made is that despite the 1966 revision of Rule 19 to lay emphasis on the equitable aspects of the doctrine of indispensable parties, the ability to obtain relief against the sovereign by naming its officer as defendant does not depend upon a weighing of prejudice but upon statutory consent to be sued.

3A James Wm. Moore, Jo Desha Lucas, George J. Grotheer, Jr., *Moore's Federal Practice* ¶ 19.15 at 19-266 n.6 (1993).

While petitioners imply the existence of a conflict among the circuits, Pet. 13, in fact each of the five courts of appeals that has considered Rule 19 in the context of a claim to Indian property shielded by sovereign immunity has reached the same conclusion as the lower court in this case did. *E.g.*, *Pembina Treaty Comm. v. Lujan*, 980 F.2d 543 (8th Cir. 1992); *Wichita & Affiliated Tribes of Oklahoma v. Hodel*, 788 F.2d 765 (D.C. Cir. 1986). This Court has declined to review at least three such decisions. *Fluent v.*

Salamanca Indian Lease Authority, 928 F.2d 542 (2d Cir.), *cert. denied*, ____ U.S. ____, 112 S. Ct. 74 (1991); *Lomayaktewa v. Hathaway*, 520 F.2d 1324 (9th Cir. 1975), *cert. denied*, 425 U.S. 903 (1976); *Tewa Tesuque v. Morton*, 498 F.2d 240 (10th Cir. 1974), *cert. denied*, 420 U.S. 962 (1975).

In *Oklahoma Tax Comm'n. v. Citizen Band of Potawatomi Indians*, 498 U.S. 505, 111 S. Ct. 905 (1991), this Court noted:

> Congress has consistently reiterated its approval of the immunity doctrine. . . . These Acts reflect Congress' desire to promote the "goal of Indian self-government, including its 'overriding goal' of encouraging tribal self-sufficiency and economic development." . . . Under these circumstances, we are not disposed to modify the long-established principle of tribal sovereign immunity.

Id. at _____, 111 S. Ct. at 910. Here, Congress specifically declined to waive the tribes' sovereign immunity with respect to claims arising under the Settlement Act.[7/]

[7/] The Settlement Act indicates that tribal actions taken pursuant to the Act are shielded by immunity: "The Yurok Transition Team, or any individual thereon, shall not be named as a defendant or otherwise joined in any suit in which a claim is made arising out of this subsection." 25 U.S.C. § 1300i-11(a) (West 1993), Pet. App. 50a. That language was explained by the Senate as follows: "the [Yurok Transition] Team and its members may lack the tribal sovereign immunity that protects the Hoopa Valley Business Council and its members while acting within the scope of either their tribal governmental authority or the authorities delegated by this Act." Making Miscellaneous Amendments to Indian Laws, and for other purposes, S. Rep. 101-226, 101st Cong., 1st Sess. at 17 (November 21, 1989). (The quoted Select Committee on Indian Affairs' report referred to an earlier version of the language ultimately added to 25 U.S.C. § 1300i-11(a) in 1990 by Pub. L. 101-301, § 9(4), 104

There is no serious question that this suit seeks to adjudicate property rights in lands held in trust by the United States for the benefit of Indian tribes. Because the existence of tribal sovereign immunity is uncontested in this case, as is the fact of its non-waiver by either tribe, the lower court's routine application of the test for when a suit is one directed against sovereign property does not warrant review. *See Metropolitan Water District v. United States*, 830 F.2d 139 (9th Cir. 1987), *aff'd without opinion sub nom., California v. United States*, 490 U.S. 920 (1989); *Naganab v. Hitchcock*, 202 U.S. 473 (1906); *Florida Dept. of Business Regulation v. Dept. of Interior*, 768 F.2d 1248 (11th Cir. 1985), *cert. denied*, 475 U.S. 1011 (1986).

Petitioners' questions presented mischaracterize the lower court's decision as a finding of indispensability when an Indian tribe is "affected by the statute" or "claims benefits from that statute." Pet. i. In fact, the lower court held the absent Hoopa Valley and Yurok Tribes to be indispensable parties but made no such ruling with respect to the absent Karuk Tribe of California although the district court pointed out that the Act "affirmed the Karuk Tribe as federally recognized and organized." Pet. App. 18a. In addition, the Act gave the Karuk Tribe representation on the Klamath River Basin Fisheries Task Force. *See* 16 U.S.C. § 460ss-3(c)(11), Resp. App. 1a. Nor did the court suggest that every tribe owning timber was indispensable, although the Act's rewriting of 25 U.S.C. § 407 directly affected each timber tribe. Resp. App. 2a.

In practice, the Court of Appeals is well able to distinguish between those cases truly directed against the property and existence of an Indian tribe and those acts which merely benefit a tribe in some way and suits in which

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Stat. 211.)

the absent tribe would suffer little prejudice. *See Stockwest Corp. v. Lujan*, 982 F.2d 1389 (9th Cir. 1993).

III. The Claims Here Could Not Be Exempted From Rule 19 Under Any "Public Rights Exception." Petitioners' assertion that the lower court's ruling was not in "conformity with this Court's rulings," Pet. 14, particularly *National Licorice Co. v. NLRB*, 309 U.S. 350 (1940), is a weak argument for amendment of Fed. R. Civ. P. 19. This Court has not approved skipping Rule 19's factual analysis of prejudice to nonparties simply because "litigation seeks the vindication of a public right." Pet. 15. Simply invoking the Constitution as a basis for relief, as petitioners do here, provides little basis for explicating unwritten language in Rule 19.

The presence of constitutional claims with regard to Indian tribal property did not avert dismissal based on non-joinder or sovereign immunity in *Morrison v. Work*, 266 U.S. 481 (1925); *Naganab v. Hitchcock*, 202 U.S. 473 (1906); *Fluent v. Salamanca Indian Lease Authority*, 928 F.2d 542 (2d Cir.), *cert. denied*, ___ U.S. ___, 112 S. Ct. 74 (1991); or *Tewa Tesuque v. Morton*, 498 F.2d 240 (10th Cir. 1974), *cert. denied*, 420 U.S. 962 (1975). Furthermore, accepting petitioners' claims as the basis for a broad exception to Rule 19 is inconsistent with *Martin v. Wilks*, 490 U.S. 755 (1989). In *Martin*, the Court rejected arguments that nonparties should be bound by settlement agreements to avoid burdening civil rights litigation, saying: "Even if we were wholly persuaded by these arguments as a matter of policy, acceptance of them would require a rewriting rather than an interpretation of [Rule 19 and Rule 24]." *Id.* at 767.

In this case, the district court ruled that what petitioners seek to enforce are "personal" and "clearly are not public rights." Pet. App. 21a. Petitioners' own characterization confirms that conclusion:

> Before the Hoopa-Yurok Settlement Act, all Indians of the reservation communally enjoyed equal rights in the entire reservation's unallotted trust lands and resources. An Indian of the reservation's rights did not depend on whether his or her particular tribe was politically organized and/or federally-recognized.

Pet. 3. Petitioners' claim to pre-Settlement Act privileges for Indians of the Reservation "seeks reallocation of certain assets," as the district court found. Pet. App. 21a. Such unique claims provide a poor vehicle for establishing a public rights exception to Rule 19. If Fed. R. Civ. P. 19 requires modification, then this Court's rule-making power codified at 28 U.S.C. § 2071 provides a better vehicle than do the special facts of this case.[8/]

IV. This Case Presents No Issue Concerning the Availability of Injunctive Relief Against Tribal Officials Acting Beyond Their Authority. Petitioners' grievances arise from Congress' adjustment of rights and have nothing to do with any action by tribal officials. This is clear from the lower courts' descriptions of the complaint, including the passage in which, as petitioners say, "[t]he court of appeals correctly characterized the nature of petitioners' claims." Pet. 7.

Petitioners' only reference to action by an Indian tribal official concerns the portion of the Settlement Act which provides:

[8/] There is no consensus on the need to amend Rule 19. *Compare* Carl Tobias, *Rule 19 and the Public Rights Exception to Party Joinder*, 65 N.C.L. Rev. 745 (1987) *with* Richard D. Freer, *Rethinking Compulsory Joinder: A Proposal to Restructure Federal Rule 19*, 60 N.Y.U.L. Rev. 1061 (1985).

> For the sole purpose of preparing the Settlement Roll under this section, the Yurok Transition Team and the Hoopa Valley Business Council may review applications, *make recommendations which the Secretary shall accept unless conflicting or erroneous*, and may appeal the Secretary's decisions concerning the Settlement Roll.

25 U.S.C. § 1300i-4(d)(4); Pet. App. 40a (emphasis added). *See* Pet. 6 n.5. Other than this general statement, petitioners identify no specific action by any individual tribal officer that aggrieves them or that supports the relief they seek.

Furthermore, petitioners have no standing to assert that recommendations of tribal officials might have constricted the Settlement Roll. Petitioners' protected interests have not been invaded by a tribal official nor is there any "causal connection between the injury and the conduct complained of . . ." *Lujan v. Defenders of Wildlife*, 504 U.S. ___, 112 S. Ct. 2130, 2136 (1992). The single petitioner who was excluded from the Settlement Roll, Carol Leigh McConnell Ammon, suffered an adverse judgment on her entitlement claim in *Short v. United States*, Fed. Cl. 102-63, on November 1, 1990. This adverse judgment, which is appealable, compelled the Secretary to exclude her from the Settlement Roll. 25 U.S.C. § 1300i-4(a)(2). Pet. App. 39a.[9/] Ms. Ammon's exclusion had nothing to do with an action of a tribal official. Petitioners therefore lack standing to present an issue regarding tribal

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[9/] That subsection provides: "The Secretary's determination of eligibility under this subsection shall be final except that . . . any *Short* plaintiff determined by the United States Court of Federal Claims not to be an Indian of the Reservation shall not be eligible for inclusion on [the Hoopa-Yurok Settlement] Roll." (West 1993)

officials' actions. Participation by tribal officials in the recommendation process is now moot, since the Hoopa-Yurok Settlement Roll was completed and published two years ago. 56 Fed. Reg. 12062 (March 21, 1991).

In cases that actually involve unlawful acts by tribal officials there is no doubt that relief against the officers is available. As this Court indicated in *Oklahoma Tax Comm'n. v. Citizen Band of Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 515, ____, 111 S. Ct. 905, 912 (1991): "We have never held that individual agents or officers of a tribe are not liable for damages in actions brought by the State. *See Ex parte Young*, 209 U.S. 123 (1908)." If various panels of the Ninth Circuit Court of Appeals are in disagreement concerning the applicability of *Ex parte Young*, and respondents see no indication of that, then the views expressed in *Burlington Northern v. Blackfeet Tribe*, 924 F.2d 899 (9th Cir. 1991), *cert. denied*, ____ U.S. ____, 112 S. Ct. 3031 (1992), will eventually be reconciled with the views expressed by the lower court here.

The lower courts in this case correctly found that the claims were directed against sovereign property, not tribal action, and that Congress has provided no waiver of sovereign immunity.

The district court's bench ruling shows its recognition that petitioners' effort to name tribal officials as defendants was merely a subterfuge. The court states: "It's utterly foolish to think you can get around and cut out the sovereign immunity of the tribes by simply suing tribal officials. . . . [T]here is no possibility of stating a cause of action taking away something over which the tribes have sovereign immunity." Pet. App. 30a. Similarly, the Court of Appeals stated:

> The real party in interest in the amended complaint is therefore the sovereign tribe;

> indeed, were it not so, the amended complaint would not remedy the lack of adequate representation which necessitated dismissal of the complaint in the first place.

Pet. App. 13a.

As the Court recognized in *Block v. North Dakota*, 461 U.S. 273 (1983), the waiver of sovereign immunity found in the Quiet Title Act, 28 U.S.C. § 2409a, cannot be expanded through the device of an officers' suit. In fact, 28 U.S.C. § 2409a(a) expressly "does not apply to trust or restricted Indian lands."

Also, Congress has not acted with respect to Indian tribes as it has with respect to federal officials. In 1976, the Administrative Procedure Act was amended to provide that claims "shall not be dismissed nor relief therein be denied on the ground that [the suit] is against the United States or that the United States is an indispensable party." 5 U.S.C. § 702 (1988). As a result, a suit nominally directed against a tribal official which in fact seeks what is unquestionably sovereign property is barred by both the sovereign immunity of the United States and of the Indian tribes. Because this case seeks to reach sovereign property it does not present any question of the availability of relief against tribal officials acting without lawful authority.

V. Neither the Presence of Other Parties Nor the Participation of Hoopa Respondents Obviated the Need to Make The Hoopa Valley and Yurok Tribes Parties. This issue will be mooted by the question whether petitioners' suit seeks to reach the property and governmental rights of absent Indian tribes possessing sovereign immunity. If it is such a suit against a sovereign, consent-to-suit is the real issue, not the presence of individuals who cannot bind the absent sovereign. *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58-59 (1978) (where sovereign immunity is not

waived, the presence of officials of the sovereign as defendants does not allow suit to proceed); *United States v. Shaw*, 309 U.S. 491, 501 (1940) (no official is empowered to consent to suits against the United States); *American Indian Agricultural Credit Consortium v. Standing Rock Sioux Tribe*, 780 F.2d 1374 (8th Cir. 1985) (signature of tribal chairman on promissory note did not waive sovereign immunity).

The adequacy of representation issue comes from Fed. R. Civ. P. 24(a). Inadequate representation exists "if the applicant shows that representation of his interests 'may be' inadequate and the burden of making that showing should be treated as minimal." *Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n.10 (1972).

Petitioners say: "Obviously, there is a conflict between petitioners and the United States," Pet. 16 n.12, yet they maintain that it is "impossible for the United States to have a conflict with the absent tribes in this situation." Pet. 16. The flaw in this reasoning is the premise that all of the interests involved stem from the Act that petitioners seek to nullify. But petitioners and the absent tribes had rights both before passage of the Hoopa-Yurok Settlement Act and afterwards. The United States has legal obligations both to petitioners and to the absent tribes regardless of the position it adopts in this litigation. *See Short v. United States*, 719 F.2d 1133, 1136 (Fed. Cir. 1983), *cert. denied*, 467 U.S. 1256 (1984) (wrongful distribution of timber income and other funds); *United States v. Eberhardt*, 789 F.2d 1354 (9th Cir. 1986) (management of reservation fisheries); *Coast Indian Community of the Resighini Rancheria v. United States*, 550 F.2d 639 (Ct. Cl. 1977) (reservation right-of-way); *Short v. United States*, 12 Cl. Ct. 36, 41-42 (1987) (use of reservation revenues to support tribal government). Because of the conflicting duties that the United States has to the petitioner tribe and individuals on the one hand and to individuals and absent tribes on the other hand, it is plain that the presence of federal officials

as defendants could not mean that the absent tribes were adequately represented.

Petitioners quote selectively from the papers below to argue with the lower court's findings that the four Hoopa members, who sought to intervene as defendants, did not adequately represent the absent tribe. Hoopa defendants' unopposed motion sought intervention "as individuals." CR#9 at 7. The Hoopa defendants explained that they intervened "to protect their individual interests only, not on behalf of the interests of the Tribe." CR#74 at 2, 4, 5-6. As intervenors they supplied the district court with examples of situations in which the interests of tribal members differed from those of the tribe itself. Hoopa defendants also pointed out that they were not a majority of the Hoopa Valley Tribal Council and had no authority to waive the Tribe's immunity. The district court stated: "[I]t is quite clear that the Hoopa Valley Tribe members who are present are appearing in their individual capacities and not as representatives of the Tribe." Pet. App. 21a n.3.

The Court of Appeals concluded that Hoopa defendants would not undoubtedly make all of the absent tribes' arguments, particularly since Hoopa defendants were unwilling to serve in that role. The Court stated:

> [T]he Act affects the rights of the intervenors as individuals, in addition to benefitting the tribe to which they belong and which appellants would have them represent. Given this potential conflict, we cannot with any certainty conclude that the intervenors would be willing to make all of the arguments of the absent tribe.

Pet. App. 10a-11a. Petitioners now attack the court's findings concerning the intervenors' willingness to make the Tribe's argument, stating: "the Hoopa respondents' counsel

also represents the Hoopa Valley Tribe in *Short* and related matters; if there were really a conflict of interest, he could not do so." Pet. 19. However, Rules of Professional Conduct 1.7 and 1.8 do not prohibit a lawyer from representing potentially adverse clients who consent after consultation and a full disclosure of the material facts. Hoopa respondents intervened to assert that their tribe was an indispensable party, an argument that was not adverse to their tribe's interests. CR#25 at 16. In any event, petitioners' speculation that the absent Hoopa Valley Tribe might be adequately represented at some time or for some purposes does nothing to suggest that Hoopa defendants adequately represent the absent Yurok Tribe.

CONCLUSION

Petitioners' claims are pending in suits brought in the forum that Congress made available, the United States Court of Federal Claims. If anything, petitioners have too many forums, not too few. There will be ample opportunity for this Court to consider petitioners' claims when that court reaches the merits.

For all of these reasons the Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit should be denied.

May 26, 1993

Respectfully submitted,

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APPENDIX A

Portions of Hoopa-Yurok Settlement Act codified at
25 U.S.C. § 407 and 16 U.S.C. § 460ss-3

SEC. 12. KLAMATH RIVER BASIN FISHERIES TASK FORCE.

(a) IN GENERAL.—Section 4(c) of the Act entitled "An Act to provide for the restoration of the fishery resources in the Klamath River Basin, and for other purposes" (16 U.S.C. 460ss-3) is amended—

(A) in the matter preceding paragraph (1), by striking out "12" and inserting in lieu thereof "14"; and

(B) by inserting at the end thereof the following new paragraphs:

"(11) A representative of the Karuk Tribe, who shall be appointed by the governing body of the Tribe,

"(12) A representative of the Yurok Tribe, who shall be appointed by the Secretary until such time as the Yurok Tribe is organized upon which time the Yurok Tribe shall appoint such representative beginning with the first appointment ordinarily occurring after the Yurok Tribe is organized".

(b) SPECIAL RULE.—The initial term of the representative appointed pursuant to section 4(c)(11) and (12) of such Act (as added by the amendment made by subsection (a)) shall be for that time which is the remainder of the terms of members of the Task Force then serving. Thereafter, the term of such representatives shall be as provided in section 4(e) of such Act.

SEC. 13. TRIBAL TIMBER SALES PROCEEDS USE.

Section 7 of the Act of June 25, 1910 (36 Stat. 857; 25 U.S.C. 407) is amended to read as follows:

"SEC. 7. Under regulations prescribed by the Secretary of the Interior, the timber on unallotted trust land in Indian reservations or on other land held in trust for tribes may be sold in accordance with the principles of sustained-yield management or to convert the land to a more desirable use. After deduction, if any, for administrative expenses under the Act of February 14, 1920 (41 Stat. 415; 25 U.S.C. 413), the proceeds of the sale shall be used——

"(1) as determined by the governing bodies of the tribes concerned and approved by the Secretary, or

"(2) in the absence of such a governing body, as determined by the Secretary for the tribe concerned.".

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APPENDIX B

Calendar No. 1025

100th Congress, *2d Session* } SENATE { Report 100-564

PARTITIONING CERTAIN RESERVATION LANDS BETWEEN THE HOOPA VALLEY TRIBE AND THE YUROK INDIANS, TO CLARIFY THE USE OF TRIBAL TIMBER PROCEEDS, AND FOR OTHER PURPOSES

September 30 (legislative day, September 26), 1988.—Ordered to be printed

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Mr. Inouye, from the Select Committee on Indian Affairs, submitting the following

REPORT

[To accompany S. 2723]

The Select Committee on Indian Affairs, to which was referred the bill (S. 2723) to partition certain reservation lands between the Hoopa Valley Tribe and the Yurok Indians, to clarify the use of tribal timber proceeds, and for other purposes, having considered the same, reports favorably thereon with an amendment and recommends that the bill as amended do pass.

The amendment is an amendment in the nature of a substitute.

PURPOSE

S. 2723, introduced by Senator Cranston on August 10, 1988, is a bill to partition certain reservation lands between

two tribes in the northern part of the State of California: the Hoopa Valley Indian Tribe and the Yurok Tribe, and to resolve long standing litigation between the United States, the Hoopa Valley Tribe and a large number of individual Indians, most, but not all of whom are of Yurok descent, who have asserted an individual interest in the communal reservation property. The claims were originally asserted in 1963 in the yet to be finalized case of *Short* v. *United States* filed in the United States Court of Claims, and has led to a number of companion or collateral cases which have made it impossible for the Hoopa Valley Tribe to perform normal tribal governmental functions, including the management of a significant portion of the reservation property.

The legislation will partition the reservation into two reservations, one consisting of the Hoopa Valley Square to be set aside for the use and benefit of the Hoopa Valley Tribe, and the other consisting of the Hoopa or Klamath Extension, to be set aside for the use and benefit of the Yurok Tribe. The authority of the Hoopa Valley Tribe to govern the Hoopa Valley Square and its interests in the assets of the Square will be confirmed. The Yurok plaintiffs are authorized to organize and adopt a constitution and the property and governmental rights of the Yurok Tribe in the Extension will be confirmed. A communal escrow account which now exceeds $65 million will be allocated between the Hoopa Tribe and the Yurok or "Short" plaintiffs. Limited per capita payments from the accrued escrow account are authorized for each of the tribes. A third portion is used to provide additional payments to persons who do not wish to become members of the newly organized Yurok Tribe. The remaining dollars are then allocated to the Yurok Tribe for governmental or development purposes.

This legislation will remove the legal impediments to the Hoopa Valley Indian Tribe to governance of the Hoopa Square and establish and confirm its property interest in the Square. The legislation will also establish and confirm the property interests of the Yurok Tribe in the Extension,

including its interest in the fishery, and enable the tribe to organize and assume governing authority in the Extension.

This legislation should not be considered in any fashion as a precedent for individualization of tribal communal assets. The solutions fashioned in this legislation spring from a series of judicial decisions that are unique to the Hoopa Valley Indian Reservation that have established certain individual interests that conflict with the general federal policies and laws favoring recognition and protection of tribal property rights and tribal governance of Indian reservations. The intent of this legislation is to bring the Hoopa Valley Tribe and the Yurok Tribe within the mainstream of federal Indian law.

The Yurok Tribe is a federally recognized tribe, but it is not organized and there is no established roll of members. This legislation enables the tribe to organize and to establish its base roll. Persons who are not members of the Hoopa Tribe but who meet certain criteria under the *Short* case are authorized to elect whether or not they wish to become an enrolled member of the Yurok Tribe, with all of the rights and benefits that that entails, including provision of federal services springing from membership in a federally recognized tribe. All minor children meeting the criteria will be deemed to be members of the Yurok Tribe unless they are already enrolled in another federally recognized tribe whose membership criteria forbids dual enrollment in another tribe.

HISTORY

ABORIGINAL TRIBES AND LANDS OF NORTHERN CALIFORNIA

The lands of what is now northern California, like most of the Pacific coastal area, were aboriginally inhabited by many small tribes or bands of Indians of numerous linguistic stocks or derivations. Representatives [sic] tribes in the general area of dispute included the Hoopa (Hupa), Chilula, Whilkut, and Nongati of Athapascan derivation; the

Yurok and Wiyot of Algonkian derivation; the Karok (Karuk), Shasta, and Chimariko of Hokan stock; and the Wintun of the Penutian language.

The original location of these tribes centered upon the drainages of the Klamath and Trinity Rivers and adjacent streams in extreme northwestern California. The Klamath River flows southwesterly out of southern Oregon to its junction with the Trinity River (which flows north and is essentially a branch of the Klamath) and, then, veering sharply to the northwest, continues to the ocean. As noted by the Court of Claims in the *Jessie Short* case, the two rivers form a "Y" whose arms are the Klamath and whose trunk is the Trinity.

The aboriginal lands of the Yurok or Klamath Indians were generally centered on the drainage of the valley of the Klamath River from the Pacific Ocean to its fork with the Trinity River. These lands lay northward from that fork and westward to the Pacific. The lands of the Wiyot, a tribe related to the Yurok, were south of the Yurok lands in a narrow strip along the ocean.

The aboriginal lands of the Hupa or Hoopa Indians were centered on the drainage of the Hoopa Valley of the Trinity River southward from its fork with the Klamath. The lands of the related tribes of the Chilula, Whilkut, and Nongatl lay to the west and south of the Hoopa lands and eastward of the Yurok and Wiyot lands.

The aboriginal lands of the Karok, and the related Shasta and Chimariko tribes, lay to the east of the Hoopa and Yurok lands on the upper drainages of both the Klamath and Trinity Rivers. The Wintun lands were southeast of the Hoopa lands along the upper drainage of the south fork of the Trinity River.

Although some scholars disagree, the U. S. Court of Claims noted in the case of *Jessie Short et al.* v. *The United States* (202 Ct. Cl. 870, 886):

> The Indian tribes of Northern California were not organized or large entities;

> Indians resident on a particular river or fork were a "tribe". Tribal names were often applied inexactly and usually meant only a place of residence. To call an Indian a "Hoopa" or a Trinity Indian meant he was an Indian resident in the valley of the Trinity called Hoopa. The names "Yurok" and "Karok" . . . also meant a place of residence.

IMPACT OF WHITE SETTLEMENT

These small Indian tribes or bands had only minimal contact with non-Indians, primarily Spanish settlers to the south or occasional fur-trading or exploration parties, until the discovery of gold in 1849. With that discovery came the well-known influx of gold seekers and other white settlers and immigrants. As the white population grew and white settlements expanded, the conflicts with local Indian tribes and bands increased in number and intensity. White settlers sought to push the Indians off their lands and demanded that local and Federal governments take steps to remove the Indians to other areas. Backed upon the Pacific Ocean, the tribes had no place else to go and the inevitable hostilities and warfare between Indians and whites began to occur.

The huge influx of whites into the area and the resulting wars had a devastating impact upon the Indian tribes. In 1850, only two years after the United States had acquired the territory from Mexico, Federal officials recognized that something had to be done quickly for the tribes. Indian Sub-agent Adam Johnston wrote that the white men had taken Indian lands and resources, introduced strange diseases, and provoked violent confrontations.

In other areas, the government had tried to relocate the Indians before the advance of white settlers; but there were already more than 100,000 whites in California, which became a state on September 9, 1850. It was decided that the best policy was to set aside small tracts of land in the new state for the tribes to protect them from the worst effects of

settlement by separating them from the whites. At the same time, vast tracts of Indian lands would be opened to eager white settlers and miners.

To effectuate this policy, Congress provided for the appointment of treaty commissioners in September of 1850 to secure the cession by the Indians of their lands and to establish reservations for them. By the end of 1851, numerous treaties with many Indian tribes or bands, including those of northern California, had been signed. On June 28, 1852, President Fillmore presented eighteen California treaties to the Senate for ratification. Because of strong white opposition to providing any lands for the Indians, the Senate, in secret session, rejected the treaties on June 28, 1852. With the rejection of these treaties, the conflicts and hostilities between white settlers and Indian tribes resumed.

In northern California, much of the warfare and bloodshed was centered in the valleys of the Klamath and Trinity Rivers which were the traditional homelands of the Yurok and Hoopa Indians and related tribes.

ESTABLISHMENT OF KLAMATH RIVER RESERVATION

In an early attempt to carry out the policy adopted with respect to California Indian tribes, President Pierce, by Executive Order of November 16, 1855, established the Klamath River Reservation for the benefit of Indian tribes in that general area. The President acted pursuant to the Act of March 3, 1853 (10 Stat. 226, 238), as amended in 1855, authorizing the creation of seven military reservations in California or in the Territories of Utah and New Mexico.

As finally established, the Klamath River Reservation was "a strip of territory commencing at the Pacific Ocean and extending 1 mile of width on each side of the Klamath River" for a distance of approximately 20 miles, containing 25,000 acres. The reservation was within the aboriginal territory of the Yurok and, at the time of its creation, was occupied by about 2,000 Indians of the Yurok tribe, also known as the

Klamaths. However, the Hoopa and other inland tribes refused to move onto this reservation and armed conflict in those areas continued.

ESTABLISHMENT OF THE HOOPA VALLEY RESERVATION

In 1864, in a further effort to bring about peace in California, Congress enacted legislation (Act of April 8, 1864, 13 Stat. 39) reorganizing the Indian Department in California by providing for the appointment of one superintendent of Indian Affairs and authorizing the President to establish four reservations in the State. On May 26, 1864, the President appointed Austin Wiley as Superintendent.

On August 12, 1864, at Fort Gaston, Wiley negotiated an agreement with the Hoopa Indians along the Trinity River entitled "Treaty of peace and friendship between the United States government and the Hoopa, South Fork, Redwood, and Grouse Creek Indians." Section 1 of the agreement provided that--

> The United States . . . by these presents doth agree and obligate itself to set aside for reservation purposes for the sole use and benefit of the tribes of Indians herein named, or such tribes as may hereafter avail themselves of the benefit of this treaty, the whole of Hoopa valley, to be held and used for the sole benefit of the Indians whose names are hereunto affixed as the representatives of their tribes.

Section 2 provided that the reservation "shall include a sufficient area of mountain on each side of the Trinity river as shall be necessary for hunting grounds, gathering berries, seeds, etc." This agreement or "treaty" was never submitted for ratification. However, with corrections, it was approved by the Interior Department.

On August 21, 1864, at Fort Gaston, California, Superintendent Wiley issued a proclamation, under the authority of the 1864 Act and instructions from the Interior Department, establishing the Hoopa Valley Reservation on the Trinity River in Klamath County, California. Wiley's proclamation provided that the metes and bounds of the reservations would be established later by order of the Interior Department, subject to the approval of the President.

The Trinity River in the Hoopa Valley flows north through the valley to the junction of the Trinity and Klamath Rivers. Since the reservation was described as extending six miles on each side of the river to the junction of the two rivers, the reservation formed a 12-mile square bisected by the last 12 miles of the Trinity River, and has come to be called the "Square" or the "12-mile Square". As of February 18, 1865, when Wiley defined the boundaries of the Hoopa Valley Reservation, there have been identified, among the various tribes resident there, a substantial number of Indians of the Hoopa Tribe living in several villages in the Hoopa Valley proper, a smaller group of Lower Klamath or Yurok Indians living in a few villages in the northern and northwestern part of the reservation, and a number of Indians of the Redwood or Chilula tribe.

On June 23, 1876, President Grant issued an executive order formally establishing the boundaries of the Hoopa Valley Reservation and provided that the land embraced therein "be, and hereby is, withdrawn from public sale, and set apart in California by act of Congress approved April 8, 1864." As bounded, the reservation was a square, twelve miles on a side, now recognized as encompassing approximately 88,665.52 acres.

The Court of Claims in the *Jessie Short* case found that, at about the time of the 1876 Executive Order, there had been identified as living within the boundaries of the reservation established the following tribes:

Tribe	1875	1876
Hoopas	571	511
Klamaths (Yuroks)	43	44
Redwoods	46	12
Saias	56	13

CREATION OF THE "ADDITION"

In the late 1880's and early 1890's, the legal validity of the 1855 Klamath River Reservation came under attack. There was growing pressure from surrounding white settlers to open these lands to homesteading. In addition, the Department of the Interior sought to control the activity of non-Indians on the reservation. In 1888, the United States brought suit against a non-Indian trader on the reservation for unauthorized activity. The district court, in an 1888 decision later upheld by the circuit court in 1889, held that the Klamath River Reservation did not have legal status as an Indian reservation. *United States* v. *Forty Eight Pounds of Rising Star Tea etc.*, 35 Fed. 403. The court held that the President's power to establish Indian reservations in California was controlled by the 1864 Act which provided for only four such reservations and that the President had exhausted his power thereunder by establishing four reservations, including the Hoopa Valley Reservation.

In order to protect the Klamath or Yurok Indians residing on the Klamath River Reservation, the Department sought to find a way to preserve reservation status. Since the 1864 Act limited the number of Indian reservations in California to four and since there were already four reservations established pursuant to that Act, the 1855 reservation could not be validated by a further executive order establishing it as a reservation. In order to get around the limitations of the 1864 Act, the Interior Department used the provisions of the 1864 Act itself.

On October 16, 1891, President Harrison issued an executive order which enlarged the Hoopa Valley Reservation "to include a tract of country 1 mile in width on each side of the Klamath River, and extending . . . to the Pacific Ocean.".[sic] In effect, the order incorporated the questionable 1855 Klamath River Reservation into the Hoopa Valley Reservation by connecting the two reservations with a strip of land one mile on either side of the Klamath River extending 25 miles from the southern boundary of the Klamath River Reservation to the northern boundary of the Hoopa Valley Reservation.

After the addition of lands by the 1891 order, the combined reservation contained about 147,000 acres, 25,000 in the original Klamath River Reservation, 33,168 acres in the "Connecting Strip", and 88,666 acres in the original Hoopa Valley Reservation or "Square".

Even though the 1891 order combined the two reservations, they continued to be treated by the Department and the Indian Service, in some respects, as two reservations, the "Addition" for the Klamath River or Yurok Indians and the "Square" for the Hoopa Indians. In 1892, Congress, by the Act of June 17, 1892 (27 Stat. 52), provided for the allotment of lands on the "Klamath River Indian Reservation" to "any Indians now located upon said reservation" and the sale of the remainder for homestead purposes. In addition, from that date forward until the present, the Department of the Interior continued to administer the combined reservations as if they were still two reservations for certain purposes.

Under this method of administration, the Hupa or Hoopa Tribe was generally recognized as being located on, and owning, the "Square" portion of the reservations. The Indians on the "Square" later formally organized a tribe and tribal government as the Hoopa Valley Tribe. The Department generally recognized the land of the original Klamath River Reservation and the 1891 "extension" as the reservation of the Yurok tribe. That tribe has never organized.

1891 TO 1955

From 1891 to 1955, the official position of the Department of the Interior and the Bureau of Indian Affairs (Indian Service) regarding the rights of tribes in the Hoopa Valley Reservation varied with the official involved and the issue under consideration.

As noted earlier, for many purposes, the "Square" and the "Addition" were treated as two separate reservations and the Yurok or Klamath Indians and the Hoopa Indians were treated as two separate tribes. Indeed, the allotment of the lands of the reservation to individual Indians and the opening of the remainder to white homesteading under various Acts of Congress dealt with the reservation as three separate tracts: the original Klamath River reservation; the "Connecting Strip"; and the "Square". Yet, official correspondence in certain years relating to the allotment process of the three tracts evidences an understanding that there was only one reservation and that the right of individual Indians to allotments were to be determined from that perspective.

The attitude of Federal officials during this time relating to the existence of tribal status and the early attempts of the Hoopa and Yurok Indians to organize was equally vacillating and confusing. In some respects, these officials encouraged and approved of efforts to organize separate entities and councils representing the two tribes. Yet, conflicting correspondence exists indicating an understanding that these separate organizations could only represent local interests and could not act with respect to the reservation as a whole.

By 1952, however, when the Commissioner of Indian Affairs approved the constitution and bylaws of the Hoopa Valley Tribe, the position of the Department, at least on a de facto basis, was that the "Square" was a reservation for the Hoopa Valley Tribe and subject to the management of the Hoopa Valley Business Council elected pursuant to that constitution. Under the constitution, the Department

recognized the membership of the Hoopa Valley Tribe which did not include most of the Yurok or Klamath Indians.

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This administrative position continued basically unchallenged until 1955, when substantial tribal revenues from the sale of commercial timber from the "Square" began to be realized. Beginning in 1955, the Secretary of the Interior began to credit revenue derived from the "Square" to a trust account separate from revenue earned from other portions of the Hoopa Valley Reservation.

From January of 1955 until February of 1969, the Secretary, upon the request of the Hoopa Valley Business Council, each year disbursed from the Hoopa Valley trust fund per capita payments to the Indians on the official roll of the Hoopa Valley Tribe. The total amount of such funds disbursed per capita was $12,657,666.50. (Subsequently, on 21 separate occasions commencing on April 10, 1969, and ending on March 7, 1980, additional per capita payments amounting to some $16,660,492 were made to individual Hoopa Indians on the official roll of the Hoopa Valley Tribe.)

In 1963, certain Indians [()identified as "Yurok" Indians) claiming descent from Indians allotted on the reservation, but not enrolled as members of the Hoopa Valley Tribe, brought a suit against the United States in the United States Court of Claims in the case of *Jessie Short et al.* v. *U. S.* (Ct. Cl. 102-63) alleging that the government had wrongfully excluded them from sharing in the per capita payments from revenues of the communal lands of the Square made by the Secretary from 1955 onward. In 1972, a Tribal [sic] Commissioner of the Court of Claims sustained the plaintiffs' position. His decision was later upheld on October 17, 1973, by the Court of Claims (202 Ct. Cl. 870) and the Supreme Court refused to review the decision in 1974.

In construing the various relevant laws and executive orders noted above, the court held that--

(1) the Hoopa Valley Reservation, as established by the Executive Order of June 23, 1876, pursuant to the 1864 Act, and as augmented by the addition of land under the Executive Order of October 16, 1891, was a single Indian reservation;

(2) no Indian tribe as a tribe had, or has, a vested right to the ownership of, the reservation or its resources;

(3) the reservation had been duly set apart for Indian purposes in 1876 to accommodate the Indian tribes of northern California;

(4) the Secretary had wrongfully paid per capita payments only to members of the Hoopa Valley Tribe to the exclusion of the plaintiffs; and

(5) that any Indian who had certain connections to the reservation and who could meet the court's standards for qualification as an "Indian of the Reservation" was entitled to share in the distribution of revenues from the "Square" and, therefore, was entitled to damages against the United States.

The court in the *Short* case is now engaged in determining which of the plaintiffs meet that criteria. Once this process has been completed, the court will enter judgment against the United States on behalf of each individual plaintiff found to meet that criteria.

PUZZ V. UNITED STATES

The decision of the Court of Claims in the *Short* case involved a money damage claim against the United States by individual Indians with respect to their right to share in the revenue derived from the resources of the "Square" upon individualization by the Secretary. The case did not deal with the issue of where the authority to make management

decisions relating to the lands and resources of the "Square" or, for that matter, the reservation as a whole was vested.

In 1980, some of the plaintiffs in the *Short* case filed suit against the United States in the United States District Court for the Northern District of California in the case of *Puzz* v. *U. S.* (No. C 80 2908 TEH). In this case, the plaintiffs challenged the right of the United States to recognize the governing body of the Hoopa Valley Tribe as the sole governing authority of the reservation entitled to manage the reservation resources. On April 8, 1988, the court held that the reservation, as extended, was intended for the communal benefit of northern California Indian tribes and groups and that, absent statutory delegations, existing tribes lacked power to manage the resources. The Court ordered the Bureau of Indian Affairs to assume the management of the reservation and its resources and to consult fairly with all persons having an interest in the reservation on its decisions.

BACKGROUND

NATURE OF U. S.-INDIAN RELATIONSHIP

From the earliest contact with the Indians of this continent, the European powers and the United States have dealt with the Indians on a government-to-government or tribal basis. The historical development of the relationship between the United States and the Indian tribes, whether it is denominated as a trust, guardianship, or government-to-government relationship, has resulted in a political relationship focusing on the Indian tribes, not on individual Indians.

The great mass of treaties, statutes, and executive orders implementing Federal Indian policy are premised upon this tribal, political relationship. To the extent such laws confer special benefits on individual Indians or impose special burdens or limitations on such Indians or their property, these laws are nevertheless founded upon the status of such Indians

as members of Indian tribes enjoying a political relationship with the United States.

The Supreme Court, in upholding the constitutionality of the law extending a preference to Indians for Federal employment in the Bureau of Indian Affairs, held that the law, and the many other Federal laws for the benefit of Indians, were not invidiously discriminatory because the laws were not based upon the racial background of the individual, but upon their status as members of an Indian tribe. *Morton* v. *Mancari*, 417 U.S. 535 (1974). In those limited cases where the Congress has legislated specially with respect to individual Indians outside their relationship as a member of an Indian tribe, other National grounds are, or will be, found.

CREATION OF INDIAN RESERVATIONS

Where the United States has not recognized the title of an Indian tribe to its aboriginal lands, usually through creation of a permanent reservation for such tribe from those aboriginal lands, the tribe does not have a compensable title in such lands and the Congress may take the lands without incurring a liability to the tribe. *Tee-Hit-Ton Indians* v. *United States*, 348 U.S. 272 (1955).

As a consequence of the nature of the relationship between Indian tribes and the United States, Indian reservations were recognized or set aside by treaty, statute, or executive order for Indian tribes, not individual Indians. In most cases, the enabling law specifically denominated the Indian tribes [sic] or tribes for whose benefit the reservation was established.

In certain cases, particularly with respect to reservations established by executive order, the source authority does not designate a particular tribe as the beneficiary of the reservations. In those cases, discretion is left in the responsible executive official to later designate the tribe or tribes to be settled on such reservation. Until such official has acted under that discretion, no tribe is deemed settle[d] on the reservation. In the December 16, 1882,

Executive Order establishing a reservation for the Hopi Tribe, the language set the lands apart for the "Moqui (Hopi) and such other Indians as the Secretary of the Interior may see fit to settle thereon." The Federal court found that the Secretary did not settle the Navajo Tribe on that reservation until long after 1882.

Whether the establishing instrument designates a tribe or tribes as beneficiaries of the reservation or leaves to the discretion of an executive official the authority to later designate beneficiary tribes, in every case, the reservation is set aside for tribal or communal purposes. Individuals have an interest in resources of the reservation only insofar as they are members of the tribal entity for whose benefit the reservation is set aside.

Where the law creating an Indian reservation designates the tribe(s) for whose benefit the reservation is created and where it is clear that the reservation is intended for the permanent benefit of such tribe, the beneficial interest in the reservation becomes vested in that tribe and the power of Congress to deal with the property is limited. Congress, in the exercise of its plenary power over Indian affairs, may modify or take the tribe's property interest in such reservation, *Lone Wolf* v. *Hitchcock*, 187 U.S. 553 (1903), but, in doing so, will be held to one of two standards.

Congress may act as trustee for the benefit of the Indians and, if it makes a good faith effort to replace the property taken with property of equal or nearly equal value, it will not be held to the 5th Amendment standard. If it take the tribe's property for the United States or for others without making such good faith effort, such action will constitute a 5th Amendment taking. *Shoshone Tribe* v. *U. S.*, 299 U.S. 476 (1937); *Three Tribes of Fort Berthold Reservation* v. *U. S.*, 182 Ct. Cl. 543 (1968); *United States* v. *Sioux Nation of Indians*, 448 U.S. 371 (1980).

In other cases, particularly with respect to executive order reservations, the law creating an Indian reservation may not designate the tribe for whose benefit it is intended or, where discretion is left to an executive official to so designate

a tribe, that discretionary authority may not have been exercised or exhausted. Or such law may not be clear that the reservation is intended for the permanent benefit of Indians. In those cases, no right, as against the exercise of the plenary power of Congress, has vested in any tribe and Congress may deal with that property as it sees fit without subjecting the United States to a liability for an unconstitutional taking. *Hynes* v. *Grimes Packing Co.*, 337 U.S. 86 (1949); *Healing* v. *Jones*, 174 F. Supp. 211; 210 F. Supp. 125 (1962), aff'd. 373 U.S. 758; *Crow Nation* v. *United States*, 81 Ct. Cl. 238, 279-80 (1935).

RECOGNITION OF INDIAN TRIBES; TRIBAL MEMBERSHIP

As noted above, the relationship between the United States and Indian tribes is a political one. While the validity of congressional or administrative actions may depend upon the existence of tribes, the courts have made clear that it is up to Congress or the Executive to extend recognition of that status. *Handbook on Federal Indian Law*, 1982, p. 3-5; *U. S.* v. *Rickert*, 188 U.S. 432 (1903). While the power of Congress, in the exercise of its plenary power over Indian affairs under the Commerce clause, to extend political recognition to an Indian tribe is very broad, it cannot be used arbitrarily. In *U. S.* v. *Sandoval*, 231 U.S. 28, 46 (1913), the Supreme Court held:

> Of course, it is not meant by this that Congress may bring a community or body of people within the range of this power by arbitrarily calling them an Indian tribe, but only that in respect of distinctly Indian communities the questions whether, to what extent, and for what time they shall be recognized and dealt with as independent tribes requiring the guardianship and protec-

> tion of the United States are to be determined by the Congress, and not by the courts.

As the power of Congress to extend such recognition is very broad, so also is the power to terminate that recognition. *Menominee Tribe* v. *U.S.*, 391 U.S. 404 (1968).

In general, an Indian tribe has the power to establish its own membership and membership requirements and this right has been consistently recognized by the Congress and the courts. Tribal membership and membership requirements are normally determined by the tribal governing authorities, typically under a tribal constitution or other recognized governing documents.

Nevertheless, Congress retains broad power to determine or modify, for various purposes, a tribe's membership. The United States may assume full control over Indian tribes and determine membership in the tribe for the purpose of adjusting rights in tribal property. *Stephens* v. *Cherokee Nation*, 174 U.S. 445 (1899). Congress may disregard existing tribal membership rolls.

In the case of *Sizemore* v. *Brady*, 235 U.S. 441, 447 (1914), the Supreme Court said:

> Like other tribal Indians, the Creeks were wards of the United States, which possessed full power, if it deemed such a course wise, to assume full control over them and their affairs, to ascertain who were members of the tribe, to distribute the lands and funds among them, and to terminate the tribal government.

And it is clear that tribal membership does not confer upon the individual a vested right in tribal or communal property. As stated in *Handbook on Federal Indian Law*, 1982, p. 605-606:

> It is well established that title to the communal land or personal property of a tribe resides in the tribe itself and is not held by tribal members individually. An individual member cannot convey title to any particular tract of tribal land and has no right against the tribe to any specific part of tribal property, absent a federal law or treaty granting vested rights to individual members. . . . A member's right to tribal property is no more than prospective and inchoate unless federal law or tribal law recognizes a more definite right. [Citations omitted.]

STATUS OF HOOPA VALLEY RESERVATION

The decisions of the United States Court of Claims in the case of *Jessie Short et al.* v. *United States* (Ct. Cl. No. 102-63) and related cases, with respect to the interest of individual Indians in the revenues from the Hoopa Valley Reservation, and the decision of the Federal district court in the case of *Puzz* v. *United States*, with respect to the obligation to manage the resources of that reservation, while perhaps correct on the peculiar facts and law, have had a very unhappy result.

It is clear from the 1864 Act authorizing the establishment of Indian reservations in California and the 1876 and 1891 Executive Orders creating the Hoopa Valley Reservation pursuant to such Act that the reservation was created for tribal or communal Indian purposes. This is consistent with the foregoing discussion and with the law of the case in the *Short* case.

Yet, the Court of Claims in the *Short* case very clearly has held that neither the organized Hoopa Valley Tribe, the unorganized Yurok Tribe, nor any other Indian tribe has any vested right to the benefits the Hoopa Valley Reservation. This, too, is consistent with the foregoing discussion. The 1876 Executive Order, creating the Hoopa Valley Reservation, merely provides that it is "set apart for Indian purposes".

Since, as noted, reservations are set aside for Indian tribes, since no tribes were designated in the order, and since the court did not find that the Secretary had definitely used or exhausted his discretion to settle any Indian tribe on the reservation, it is clear that no tribal vested rights, as against the plenary power of Congress to deal with the property, have arisen. This applies not only of Hoopa and Yurok tribal entitlements but also of Karuk claims and claims of groups such as the Tolowa, Wintun and Shasta who are currently seeking federal recognition of tribal status pursuant to 25 C.F.R. Part 83.

The Conclusions of Law by the Federal district court in the *Healing* v. *Jones* case might be instructive. [T]he 1882 Executive Order creating the reservation did designate the Hopi Tribe as a beneficiary, but retained with the Secretary the right "to settle other Indians thereon". In Conclusion of Law No. 2, the court stated:

> By force and effect of the Executive Order of December 16, 1882, . . . the Hopi Indian tribe, on December 16, 1882, for the common use and benefit of the Hopi Indians, acquired the **non-vested** (emphasis added) right to use and occupy the entire reservation . . . subject to the paramount title of the United States, and subject to such diminution in the rights . . . so acquired as might thereafter lawfully result from the exercise of the authority reserved in the Secretary to settle other Indians in the reservation.

It is the Committee's conclusion that, as found by the *Short* case, no constitutionally protected rights have vested in any Indian tribe in and to the communal lands and other resources of the Hoopa Valley Reservation. In carrying out the trust responsibility of the United States under Congress' plenary power, the Committee finds that H.R. 4469, as reported, is a reasonable and equitable method of resolving

the confusion and uncertainty now existing on the Hoopa Valley Reservation.

While the court in the *Short* case has found that no tribe have [sic] a vested right in the reservation, it was equally clear on the point that none of the plaintiffs nor any other individual has a vested right in the property. Again, this holding of the court is consistent with the discussion above on the rights of tribal members in tribal property. Two cites from the Federal courts' several decisions in this case may be helpful. In a 1983 decision of the Circuit Court in this case, the court said:

> At the close of our opinion we again stress--what the Court of Claims several times emphasized and we have interlaced supra--that *all* we are deciding are the standards to be applied in determining those plaintiffs who should share as individuals in the monies from the . . . Reservation unlawful withheld by the United States. . . . This is solely a suit against the United States for monies, and everything we decide is in that connection alone; neither the Claims Court nor this court is issuing a general declaratory judgment. We are not deciding standards for membership in any tribe, band, or Indian group, nor are we ruling that Hoopa membership standards should or must control membership in a Yurok tribe or any other entity that may be organized on the Reservation.

In its March 17, 1987, decision, the court said:

> . . . an individual Indian's rights in tribal or unallotted property arise only upon individualization; individual Indians do not hold vested severable interests in unallotted tribal lands and monies as tenants in common.

Again, the Committee agrees with the court in the *Short* case that neither the plaintiffs nor any other individuals have a vested right in the Hoopa Valley Reservation as against the right of Congress to make further disposition of that property. As noted above, Congress has power to make determinations about tribal membership with respect to the adjustment of participation in tribal property. The power is even more clear in this case, where, except for the Hoopa Valley Tribe, there is no organized tribe which has a definable membership.

The Committee is also aware that although Congress later authorized the establishment of additional reservations in California, the Act of April 8, 1864 authorized the establishment of four reservations, including Hoopa Valley, Round Valley, Tule River and Mission. As noted above, in the *Puzz* case, a federal district court construed the Act as requiring that the Bureau of Indian Affairs run the Hoopa Valley Reservation for the benefit of all individuals (including non-tribal members) who had ancestral connections with the Reservation, and also construed the Act as prohibiting the exercise of reserved tribal sovereign powers by Indian tribal governments, with respect to the Hoopa Valley Reservation. The Committee believes that the *Puzz* case is confined to the peculiar facts and law applicable to the Hoopa Valley Reservation, and it is the purpose of S. 2723 to reject the application of this view of the 1864 Act to any California reservation. S. 2723 should therefore help ease the concerns of other tribal councils whose reservation lands are affected in whole or in part by the 1864 Act or similar legislation. It is not true, as a general rule, that federally recognized tribal governing bodies on reservations set apart for more than one historical tribal group need federal authority conferred upon them in order to exercise territorial management powers. Application of such a rule would seriously interfere with tribal sovereignty and modern federal Indian policy.

SETTLEMENT PROVISIONS

S. 2723, as reported by the Committee, is a fair and equitable settlement of the dispute relating to the ownership and management of the Hoopa Valley Reservation. The Section-by-Section Analysis and Explanation which follows sets out in detail the provisions of the bill.

The bill provides for the partition of the joint reservation between the Hoopa Valley Tribe and the Yurok Tribe. As noted, the Committee has concluded that there are no tribal or individual vested rights in the reservation and that Congress has full power to dispose of the reservation as proposed. As a consequence, the Committee need not overly concern itself with precise comparable values in such partition. The Committee intends to deal fairly with all the interests in the reservation, and believes it has done so. The nature of the interests involved here, however, is such that Congress need not precisely determine, or provide, the full value that a fee simple interest in these lands and resources might have.

It is alleged that the "Square", to be partitioned to the Hoopa Valley Tribe, is much more valuable than the "Addition" which is to go to the Yurok Tribe. Tribal revenue from the "Square" is in excess of $1,000,000 annually. Tribal revenue derived from the "Addition" recently has totalled only about $175,000 annually. However, the record shows that individual Indian earnings derived from the tribal commercial fishing right appurtenant to the "Addition" is also in excess of $1,000,000 a year. The Committee also notes that because of the cooperative efforts of the Hoopa Valley Tribe and other management agencies to improve the Klamath River system, and because of the Fisheries Harvest Allocation Agreement apportioning an increased share of the allowable harvest to the Indian fishery, the tribal revenue potential from the "Addition" is substantial. While in recent years tribal income from the "Square" has exceeded tribal income from the "Addition," it is the judgment of the Committee that a functioning tribal government fulfilling the Congress' and the

Executive's policy of self-determination merits a certain financial deference over a group of Indians which has previously elected not to have a functioning tribal government. See Indian Self-Determination and Education Assistance Act, Pub. L. No. 93-638, 88 Stat. 2203, codified at 25 U.S.C. §§ 450, et seq.; President's statement on Indian Policy, 19 Weekly Comp. Pres. Doc. 98, 99 (Jan. 24, 1983); S. Con. Res. 76, ordered reported, Senate Indian Committee, 100th Cong., 2nd Sess. (1988). Furthermore, the Committee is acting out of concern that the Hoopas have tended to live on the reservation and that their government be accorded sufficient resources to provide the services necessary to sustain their habitation. Indeed the majority of the Indians living on the combined reservation live on the "Square." The record shows that the Hoopa Valley Business Council is the only full-service local governmental organization on the combined reservation, and has been the major government service provider in the extremely isolated eastern half of Humboldt County. The Hoopa Valley Tribe was recognized by the Congress as warranting federal assistance and support for its self-governance efforts. Conf. Rep. No. 498, 100th Cong., 1st Sess. 889.

As noted elsewhere in this report, the proposed partition is also consistent with the aboriginal territory of the two named tribes involved, particularly since the Hoopa Valley Tribe formally organized in a way encompassing all Indian allotted land on the Square.

The bill also provides for certain settlement options to be made available to individual Indians who can meet the requirement of the court for qualification as an "Indian of the Reservation". With the exception of a limited option to become a member of the existing Hoopa Valley Tribe, the settlement options are either to become a member of the Yurok Tribe or to elect a buy-out option. The settlement terms are to be supported primarily through the use of funds earned from the reservation and maintained by the Secretary in escrow accounts.

The Committee wishes to make very clear that this offer of options by way of settlement of this problem in no way is to be construed as any recognition of individual rights in and to the reservation or the funds in escrow.

LEGISLATIVE HISTORY

On April 26, 1988, Congressman Bosco introduced H.R. 4469 to partition certain reservation lands between the Hoopa Valley Tribe and the Yurok Indians, to clarify the use of tribal timber lands, and for other purposes. The bill is co-sponsored by Representatives Coelho and Miller of California. The intent of the legislation is to resolve a long-standing controversy between the Hoopa Valley Tribe which is organized under constitutional provisions approved by the Secretary of the Interior and persons who are primarily, but not exclusively, of Yurok Indian descent.

On August 10, 1988, the House Committee on Interior and Insular Affairs adopted an amendment in the nature of a substitute and ordered H.R. 4469 reported. The bill is scheduled for a further hearing before the House Judiciary Committee on Friday, September 30, 1988.

On June 30, 1988, Chairman Inouye held an oversight hearing in Sacramento, California, to receive testimony on the general background of the problems and issues on the Hoopa Valley Reservation. This hearing was not directed to specific legislation, but was only for purpose of collecting background information.

On August 10, 1988, Senator Cranston introduced S. 2723, which is identical to H.R. 4469 as ordered reported. The Select Committee held hearings on this bill on September 14, 1988. On September 29, 1988, the Select Committee in open business session, adopted an amendment in the nature of a substitute, and ordered the bill reported with a recommendation that the bill, as amended, be passed.

COMMITTEE RECOMMENDATION AND TABULATION OF VOTE

The Select Committee on Indian Affairs, in open business session on September 29, 1988, by unanimous vote of a quorum present, adopted an amendment in the nature of a substitute and ordered the bill reported with a recommendation that S. 2723, as amended, be passed by the Senate.

SECTION-BY-SECTION ANALYSIS

There follows a section-by-section analysis of S. 2723 a[s] reported and, where appropriate or necessary, a further explanation of the provisions of the bill.

SECTION 1 - SHORT TITLE AND DEFINITIONS

Subsection (a) provides that the Act may be cited as the "Hoopa-Yurok Settlement Act".

Subsection (b) contains definitions of various terms used in the bill.

Among the more important definitions is the definition of "Escrow funds", which lists the accounts maintained by the Secretary of the Interior into which income from reservation economic activity (as opposed to individual trust monies) are deposited; "Indian of the Reservation", which is a term of art developed in the *Short* case to define those persons entitled under *Short* and companion cases as eligible plaintiffs in the claims against the United States arising from the distribution of income from reservation wide economic activities; and definition of "Short cases" to include all companion cases filed thus far.

SECTION 2 - RESERVATIONS; PARTITION AND ADDITIONS

Subsection (a), paragraph (1), provides that, when the Hoopa Valley Tribe adopts a resolution waiving certain claims and granting consent as provided in paragraph (2), the Hoopa Valley Reservation as now constituted and as defined by the Federal Court in the *Short* case, shall be partitioned as provided in subsection (b) and (c). A technical amendment is added to make clear that the partition is linked to recognition and confirmation of the governing documents of the Hoopa Valley Tribe, as provided in Section 8.

Paragraph (2) provides that the partition of the reservation as provided in paragraph (1) shall not be effective unless the Hoopa Valley Tribe adopts a tribal resolution within 60 days of enactment waiving any claim they may have against the United States arising out of the provisions of the Act. The Secretary is required to publish the resolution in the Federal Register.

An amendment is added to make clear the consent of the Hoopa Valley Tribe to the contribution of the escrow funds to the Settlement Fund. This amendment was requested by the Justice Department. The Committee does not intend that the requirement for a Hoopa tribal waiver under this section or the Yurok tribal waiver requirement under section 9(d)(2) shall constitute a congressional recognition that such tribes or any other Indian tribe may have vested rights in the lands and resources of the joint reservation. In *Hynes* v. *Grimes Packing Co.*[,] 337 U.S. 86, 103 (1949), the Supreme Court held that an executive order reservation "conveys no right of use or occupancy to the beneficiaries beyond the pleasure of Congress or the President."

Subsequent cases establish that the compensable right of a tribe in an executive order reservation depends upon its status as a confirmed or unconfirmed reservation. The exact legal status of the reservation is unclear from the various Federal court decisions relating to it. However, the

decision[s] of the Court of Claims in the *Short* case and the District Court in the *Puzz* case make clear that no existing Indian tribe as a tribe, including the Hoopa and Yurok tribes, have a vested right in the assets and resources of the Hoopa Valley Reservation as now constituted.

The Committee also does not intend that the waivers of the tribes, if given, shall present [sic] the tribes from enforcing rights or obligations created by this Act.

Subsection (b) provides that, effective with the partition as provided in subsection (a), that portion of the reservation known as the "Square" shall be recognized as the Hoopa Valley Reservation and shall be a reservation for the Hoopa Valley Tribe. The Committee notes that, while the record before the Committee and the findings of the court in the *Short* cases show that the "Square" included aboriginal lands of the Yurok or Klamath Indians, most of the lands of the "Square" were within the aboriginal territory of the Hoopa and related bands and villages. This partition also conforms generally with the geography of the reservation which, as currently constituted, comprises two river drainages.

Subsection (c), paragraph (1), provides that, effective with the partition as provided in subsection (a), that portion of the reservation known as the "extension", excluding the lands of the Resighini Rancheria, shall be recognized as the Yurok Reservation and shall be a reservation for the Yurok Tribe. The Committee again notes that the lands comprising the new Yurok reservation were within the aboriginal lands of the Yurok or Klamath bands or villages. Karuk tribal aboriginal lands generally lay upstream of Yurok lands along the Klamath River, outside of the Yurok and Hoopa Valley Reservations.

Paragraph (2) provides that, subject to all valid existing rights, all national forest lands in the Yurok Reservation and about 14 acres of the Yurok Experimental Forest shall be transferred to the Yurok Tribe in trust. These lands contain buildings which will be immediately utilized by the Yurok Tribe. The Committee, therefore, expects the Secretary of the Interior to work with the Yurok Interim

Council to ensure that these facilities are cleaned and renovated as soon as possible. This clean-up and renovation should be accomplished under the BIA's existing facilities maintenance and repair budget. In addition, the Secretary shall within six months report to Congress concerning the advantages, disadvantages, and procedural aspects of conveying to the Yurok Tribe all National Park System lands within the Yurok Reservation. If the Secretary does not recommend immediate conveyance of such lands, his recommendation shall include a proposed inter-governmental agreement which, pending any conveyance, will assure Yurok tribal hunting, fishing, and gathering rights, and reasonable ceremonial and religious access and use on such lands within the reservation.

Paragraph (3) provides that the existing authority of the Secretary to acquire lands for Indians and Indian tribes under the Indian Reorganization Act of 1934 shall be applicable to the Yurok Tribe. $5,000,000 is authorized to be appropriated and is directed to be used for land acquisition for the Yurok Tribe with the limitation that such funds can be used to acquire land outside the reservation only for purposes of exchange for lands inside. An amendment is added to permit acquisition of lands adjacent to and contiguous with the Yurok reservation. The Committee expects that the Secretary will make use of this and other authority to, among other things, insure that Indian lands within the reservation are not, or do not become, landlocked. The Committee is aware that the acquisition of new lands will increase the costs of land and resource management. The Committee, therefore, directs the Secretary to consider these additional costs when preparing the future budgets of the Yurok Tribe.

Paragraph (4) provides that (1) the transfer of funds to the Yurok Tribe under section 4 and 7; (2) the land transfer under subsection 2(c)(2); (3) the land acquisition authority of section 2(c)(3); and (4) the organizational authorities for the Yurok Tribe under section 9 shall not be effective unless the Interim Council of the Yurok Tribe adopts a resolution waiving any claims it might have against

the United States under this Act and granting consent as provided in section 9(d)(2). Section 9 of the bill provides for an Interim Council to be elected by the General Council of the tribe.

Subsection (d) provides that the boundary line between the Hoopa Valley and Yurok reservations, as partitioned in this section, shall be the line established by the Bissel-Smith survey and that the Secretary shall publish the boundary descriptions in the Federal Register. Use of the Bissel-Smith survey for purposes of defining the Hoopa Valley Indian Reservation results in the addition of lands to the Yurok Reservation in the upper reaches of the extension near the junction of the Klamath River with the Trinity River. The transition village known as "Peekta" Point, claimed by the Yurok Tribe, now apparently becomes part of the Yurok Reservation.

Subsection (e) provides for the management of the tribal lands of the Yurok Reservation by the Secretary until the organization of the tribe under section 9 and, thereafter, by the Yurok Tribe.

Subsection (f) provides that the State of California shall continue to have criminal and civil jurisdiction on the two reservations under Public Law 83-280 with authority to retrocede such jurisdiction to the United States.

SECTION 3 - PRESERVATION OF SHORT CASES

Section 3 provides that nothing in this Act shall affect, in any way whatsoever, the individual entitlements already established in the various decisions of the Federal courts in the so-called *Short* cases nor any eventual entry of final judgment in those cases.

When final judgment is entered in the *Short* cases, the court will have determined which of the 3,800 intervening individual plaintiffs have met the standards of the court for qualification as an "Indian of the Reservation" and will have determined the amount of monetary damages to which each such individual plaintiff is entitled from the United States.

Nothing in this legislation is intended to affect the right of such individuals to that final award under the law of the case. While the Committee does not believe that this legislation, as a prospective settlement of this dispute, is in any way in conflict with the law of the case in the *Short* cases, to the extent there is such a conflict, it is intended that this legislation will govern.

SECTION 4 - HOOPA-YUROK SETTLEMENT FUND

Subsection (a), paragraph (1), establishes a Hoopa-Yurok Settlement Fund into which the Secretary is directed to deposit all Escrow funds, together with accrued income, derived from revenue of the reservation. The definition of the Excrow [sic] funds is intended to be a comprehensive list of the funds and accounts, in federal hands, derived from the lands or resources of the joint reservation. It is estimated that this amount now totals approximately $65,000,000.

Paragraph (2) permits the Secretary to continue to make payments to the Hoopa Valley Tribe, out of the interest or principal of the Settlement Fund, for tribal governmental and management purposes, excluding per capita payments, in an amount not to exceed $3,500,000 per fiscal year. These payments will be deducted from what would otherwise be the Hoopa Valley Tribe's share as apportioned by subsection (c).

Paragraph (3) as added by the Committee authorizes the Secretary to provide appropriated funds to the Yurok Transition Team, and also authorizes the Secretary to make payments to the Yurok Transition Team, out of the interest or principal of the Settlement Fund, for the purposes for which the Yurok Transition Team is established under section 9, in an amount not to exceed $500,000 per fiscal year. These payments will be deducted from what would otherwise be the Yurok Tribe's share as apportioned by subsection (d).

Subsection (b) provides that the Secretary shall make payments from the Settlement Fund as provided in this Act and, pending dissolution of the Fund, shall administer and invest such funds as Indian trust funds are administered.

Subsection (c) directs the Secretary, upon publication of the option election date pursuant to section 6(a)(4), to pay out of the Fund and to hold in trust for the Hoopa Valley Tribe an amount which shall be based upon the percentage arrived at by dividing the number of members of the Hoopa Tribe as of such date by the sum of the number of such members and the number of persons on the final roll prepared pursuant to section 5. After the elections pursuant to section 6 have been made, the payment to the Hoopa Valley Tribe shall be increased or decreased based on the persons who are enrolled in the Tribe pursuant to section 6. Under this formula, it is estimated that approximately $23 million will be paid to the Hoopa Tribe. This is roughly one-third of the entire Settlement Fund.

Subsection (d) directs the Secretary to make a similar payment for the Yurok Tribe with the amount being determined by dividing the number of persons on the Settlement Roll electing to be members of the Yurok Tribe by the sum of the number of members of the Hoopa Tribe, as determined under subsection (c), and the number of persons on such roll prepared under section 5. The amount allocated to the Yurok Tribe will be based on how many individuals meeting the *Short* case standards elect to become members of the Yurok Tribe. If only 25% of the adults eligible accept the Yurok membership option, approximately $6.7 million remaining in the Settlement account, for a total tribe share of $18.1 million. According to the pro-organization Yurok group the 25% membership estimate is extremely low. They estimate that the percentage accepting tribal membership will exceed 50%. If this is true the Yurok Tribe will receive in excess of $23.5 million. This is roughly one-third of the entire Settlement Fund.

Subsection (e) authorizes the appropriation of $10,000,000 for deposit in the Settlement Fund as the Federal share after Hoopa and Yurok tribal payments pursuant to section 4 and the payments to the Yurok member[s] pursuant to section 6(c) are made. The Fund, with the Federal share

and with any earned income, is to be available to make the payments authorized by section 6(d).

As noted elsewhere in this report, it is in large part due to the unjust, historical treatment of California Indians by the United States, to the enactment and promulgation of confusing and ambiguous laws, and to the vacillating and uncertain policies of U.S. officials that [t]his unfortunate situation now exists. The Committee feels that $10,000,000 of Federal funds, added to the funds of the Indians, is a small price to pay to rectify this situation and permit implementation of the federal policy of government-to-government relations with the Hoopa Valley and Yurok Tribes.

SECTION 5 - HOOPA-YUROK SETTLEMENT ROLL

Subsection (a) directs the Secretary to prepare a roll of all persons who can meet the criteria established by the Federal courts in the *Short* case for qualification as an "Indian of the Reservation" and who also (1) were born on or prior to, and living on, the date of enactment; (2) are citizens of the United States; and (3) were not members of the Hoopa Valley Tribe as of August 8, 1988. The Secretary's determination is final except that plaintiffs in the *Short* cases who have been found by the Federal court to meet the qualification as an "Indian of the Reservation" shall be included on the roll if they meet the other requirements and those who are found by the court not to meet such qualifications may not be included on the roll. Persons who are not plaintiffs in the *Short* cases may also be included on the roll if they timely apply and meet the criteria established. The Committee expects the Secretary to place on the roll the names of all living Indians of the Reservation held qualified in the *Short* cases whether or not an application is timely received from such persons, since address changes or other unforeseen event may prevent persons from receiving actual notice, and the qualifications of such persons are readily verified.

Subsection (b) requires the Secretary, within 30 days of enactment, to give notice of the right to apply for enrollment under this section. It requires actual notice by registered mail to *Short* plaintiffs, notice to their attorneys, and notice in local newspapers. Such notice is also to be published in the Federal Register.

Subsection (c) establishes the deadline for applications as 120 days after the Federal Register publication in subsection (b).

Subsection (d), paragraph (1), provides that the Secretary shall make his determinations of eligibility and publish a final roll in the Federal Register 180 days after the date established in subsection (c).

Paragraph (2) requires the Secretary to establish procedures for the consideration of appeals from applicants not included on the final roll. These appeals will not prevent the roll from being made final. Successful appellants are to be later added to the roll and any payments they become entitled to, as a result of the election of options, are to be paid from any funds remaining in the Settlement Fund before payment to the Yurok tribe as provided in section 7. The subsequent inclusion of such persons on the roll, and any election of option they may make, are not to affect any calculations made for the payments to the Hoopa and Yurok Tribe under section 4. However, deletion of persons found erroneously to have been included on the roll may lead to adjustment of the calculations and payments made under section 4.

Subsection (e) provides that anyone not included on the final Settlement Roll shall not have any interest in the Hoopa Valley Reservation, the Hoopa Valley Tribe, the Yurok Reservation, or the Yurok Tribe or in the Settlement Fund unless they may be subsequently admitted to tribal membership by either of those tribes. The provisions of this subsection are not intended to imply an congressional determination that such persons do now have any such interest. Nor are these provisions intended to imply that the federal Indian status of any person would be lost by omission

from the final Settlement Roll. These are not termination provisions, as explained under section 6(d).

SECTION 6 - ELECTION OF SETTLEMENT OPTIONS.

As noted elsewhere, the court has determined that, while the lands and resources of the Hoopa Valley Reservation as now constituted are tribal or communal property, neither the Hoopa or Yurok Tribe nor any other tribe has a vested right in such property. Where the tribal property right is vested, if at all, is problematical and probably remains with the United States subject to disposition pursuant to the rationale of the *Hynes* v. *Grimes Packing Co.* case.

In any case, under the general theories of Federal-Indian law and under the law of the case of the *Short* cases, it is the Committee's conclusion that no individual, including persons meeting the qualifications of the court as an "Indian of the Reservation" or members of the Hoopa Valley Tribe, separately or collectively, have any legally enforceable right in the lands and resources of the reservation.

Therefore, the settlement provisions of this section are not to be construed as a congressional recognition, directly or impliedly, that such individuals have any such right or that the payments or benefits conferred by this section are in payment for the taking of any such rights. The Committee is seeking to further the responsibility of the Congress and the United States as the trustee and guardian of Indian tribes and property to resolve the chaos and uncertainty now affecting these Indians, these tribes, and this property. The benefits made available to individuals under this section are a recognition that they may have an inchoate or expectancy interest in such property and that, as a matter of fairness, they should be given reasonable options for settlement.

It is also the Committee's intent that the election of an option under this section, together with all the valuable benefits which flow therefrom, shall constitute a waiver by the individual so electing of any claim such person may have

against the United States arising out of this Act except those created by sections 5 and 6.

Subsection (a), paragraph (1), provides that, 60 days after publication of the Settlement Roll, the Secretary shall give notice by registered mail to all adult persons on the roll of their right to elect an option under the Act.

Paragraph (2) provides that the notice must be comprehensive with an objective analysis of advantages and disadvantages of each option, but couched in easily understood language. S. 2723, as introduced, would provide that the election of an eligible adult would bind minor children under their guardianship who are also on the roll. The Committee deleted this provision and amended paragraphs (2) and (3) [to] provide that minor children will be deemed to have elected membership in the Yurok Tribe, with certain exceptions. In addition, the Committee added language specifying that the notice discuss counseling services that the Yurok Transition Team and the Secretary shall provide, and the affidavit requirement of section 6(d).

Paragraph (3) as amended by the Committee, automatically makes minors on the roll members of the Yurok Tribe unless the parent or guardian comes forward with proof, satisfactory to the Secretary, that the minor is enrolled in another tribe that prohibits members from enrolling elsewhere. Thus, in the case of a child who is already an enrolled member of another federally recognized tribe, such parent or guardian may elect the tribe in which such child will be enrolled. Therefore, with respect to minors on the roll who do not also have a parent or guardian on the roll, notice is to be given to the parent or guardian of such minor. The paragraph further directs that the minor's funds be invested and administered as Indian trust funds, like the Settlement Fund itself, until the age of majority is reached.

Paragraph (4) provides that the Secretary shall establish the deadline for making a choice as the date which is 120 days after the date of promulgation of the Settlement Roll as provided in section 5(d). Persons not making an election by the date established under this paragraph are

deemed to have made an election under subsection (c). The Committee believes it is important that no person on the Hoopa-Yurok Settlement Roll lose benefits and privileges flowing from Yurok tribal membership and connection with the Yurok Reservation by virtue of inadvertence, failure to receive actual notice, accident or other unforeseeable events. Accordingly, persons failing to act timely will be deemed to have elected Yurok tribal membership if they accept and cash the check representing the payment authorized by subsection (c).

The Committee believes that acceptance of the payment also establishes the consensual release of rights that accompanies this election. On the other hand, one who fails or refuses to make an election, and refuses to accept the payment authorized by subsection (c) may not be deemed to have granted a release or to have granted a proxy to the Yurok Interim Tribal Council. Thus, refusing to accept the payment is one method by which persons who do not wish to join the Yurok Tribe may avoid becoming members. Persons already enrolled in another Indian tribe that prohibits dual enrollment may, for example, wish to decline Yurok tribal membership. In addition, a person who becomes a member of any Indian tribe is at liberty to terminate the tribal relationship whenever he or she so chooses. E.g., F. Cohen, Handbook of Federal Indian Law 22 (1982 Ed.).

Subsection (b), paragraph (1), provides that any person on the roll, 18 years or older, who can meet certain membership criteria of the Hoopa Valley Tribe as established by the U.S. Claims Court and who (1) maintains a residence on the reservation on the date of enactment; (2) had, within five years prior to enactment, maintained such residence; or (3) owns an interest in real property on the reservation can elect to become a member of the Hoopa Valley Tribe.

Paragraph (2) provides that the Secretary shall cause such person to be so enrolled notwithstanding any laws of the Hoopa Valley Tribe to the contrary and, after being so enrolled, such person will be a full member of the tribe for all purposes.

Paragraph (3) provides that the Secretary will assign to such person the degree of Indian blood or Hoopa Indian blood, as appropriate, based upon the criteria established by the Federal Court in the *Short* case.

Paragraph (4) provides that any person making such an election shall no longer have any interest in the Yurok Reservation, the Yurok Tribe, or the Settlement Fund. This paragraph and paragraphs (c)(4) and (d)(2) do not contemplate that such persons now have any particular interest, but that, to the extent they do, it will be automatically relinquished upon an election of one of the options.

Subsection (c), paragraph (1), provides that any person on the final roll may elect to become a member of the Yurok Tribe and participate in the organization of the tribe pursuant to section 9.

Paragraph (2) provides that persons making such election shall form the base membership roll of the Yurok Tribe and the Secretary shall assign to a person making such an election the degree of Indian blood determined using the criteria of the Federal court.

Paragraph (3) directs the Secretary, to pay to each person under age 50 and making an election under this subsection $5,000 out of the Settlement Fund; $7,500 for those age 50 or older. These sums were established on the basis of the Committee's amendment. The distribution of such funds shall be subject to the provisions of Section 7 of the Act of October 19, 1973 (87 Stat. 466), as amended (25 U.S.C. § 1407).

Paragraph (4) provides that persons making an election under this subsection shall no longer have any interest in the Hoopa Valley Reservation or the Hoopa Valley Tribe or, except as provided in paragraph (3), in the Settlement Fund. As amended by the Committee, additional language is included to provide that the exercise of the option shall authorize the Yurok Interim Council to waive claims of the Yurok Tribe against the United States.

Subsection (d), paragraph (1), provides that any person on the final roll can make an election to receive a lump sum payment from the Settlement Fund and directs the Secretary to pay to each such person the amount of $15,000 out of the Settlement Fund. This sum was decreased from the $20,000 provided in S. 2723 as originally introduced. Election of this option, however, has been conditioned by the Committee upon completion of an affidavit concerning counseling regarding the effects of such an election. This subsection does not suggest, and the Committee does not intend that this Act change the federal Indian status of any person, regardless of the option elected, nor does this Act end federal trust restrictions that may exist as to any allotted or unallotted trust land, property[,] resources or rights. The option provided by section 6(d) is not a termination provision; it merely offers a lump-sum payment to persons on the settlement roll who wish to have no future interests or rights in the tribal, communal, or unallotted land, property, resources, or rights in the tribal, communal, or unallotted land, property, resources, or rights of the Hoopa Valley Reservation or the Yurok Reservation or the Hoopa or Yurok tribes. By contract [sic], the language of the Western Indians Termination Statute declared that the purpose of the Statute was, among other things, "for a termination of Federal services furnished such Indians because of their status as Indians." 25 U.S.C. 691. That termination Act provided that:

> Thereafter individual members of the Tribe shall not be entitled to any services performed by the United States for Indians because of their status as Indians, all statutes of the United States which affect Indians because of their status as Indians . . . shall no longer be applicable to the members of the Tribe, and the laws of the several States shall apply to the tribe and its members in the same manner as they apply to other citizens or

persons within their jurisdiction. 25 U.S.C. 703(a)(1982)

Neither section 6(d) nor any other provision of this Act is so intended. This Act does not represent a return to a national policy of termination or of encouraging tribal members to withdraw from their tribes. However, the circumstances concerning this reservation and the complex litigation which has prevented tribal self-determination justify the congressional role in restoration of tribal self-governance represented by this Act.

Paragraph (2) provides that any person making an election under this subsection shall no longer have any interest in the Hoopa Valley Reservation, the Hoopa Valley Tribe, the Yurok Reservation, and the Yurok Tribe and, except as provided in paragraph (2), in the Settlement Fund.

SECTION 7 - DIVISION OF SETTLEMENT FUND REMAINDER

Subsection (a) provides that any funds remaining in the Settlement Fund after payments made pursuant to section 6 and to successful appellants shall be shall be held in trust by the Secretary for the Yurok Tribe.

Subsection (b) provides that funds apportioned to the two tribes by section 4 and 6 shall not be available for per capita distribution for a period of ten years after the date of division made under this section. Other tribal funds, or income of the apportioned funds, are not intended to be restricted by this subsection. As amended by the Committee this would allow the Hoopa Tribe to make one or more per capital payments to its members from such funds, totalling not more than $5,000, a sum similar to that provided for those electing to become members of the Yurok Tribe. There is no provision for a bonus payment to those 50 years or older since no election is involved and the Hoopa members have been receiving the full range of federal services over the years. Under the Act of August 1, 1983, the Committee understands

that payments on behalf of minor tribal members shall be held in trust accounts and invested for the minors.

SECTION 8 - HOOPA VALLEY TRIBE; CONFIRMATION OF STATUS

Section 8 preserves, ratifies, and confirms the existing status of the Hoopa Valley Tribe as a Federally-recognized tribe and reinstates full recognition of its governing documents and governing body as heretofore recognized by the Secretary.

In the record before the Committee and in the findings of the court in the *Short* cases, some significance is attached to the fact that some members of the Hoopa Valley Tribe had admixtures of the blood of the Yurok or other tribes or, in some cases, that such admixture was greater than their Hoopa blood. The Committee does not attach any significance to this fact by itself nor does it find that this admixture of tribal blood detracts from the integrity of the Hoopa Valley Tribe as a tribe of Indians. Most, if not all, Federally-recognized Indian tribes have members who are not of the full degree of blood of the ancestral tribe. Through inter-tribal marriages, most Indian tribes have a membership of mixed Indian blood. Indeed, most have a membership with mixed Indian and non-Indian blood. The Hoopa Valley Tribe clearly has and continues to function as an Indian tribe in the political sense.

SECTION 9 - RECOGNITION AND ORGANIZATION OF THE YUROK TRIBE

This section provides for the development of a membership for a Yurok Tribe and for its organization. The Committee realizes that there may be some people on the Settlement Roll who will have little or no Yurok Indian blood who may wish to select this option. The discussion under section 8 above is relevant here.

Subsection (a), paragraph (1), provides that those persons electing the Yurok Membership option under section 6 shall form the base roll of the Yurok Tribe whose status as a Federally-recognized tribe, subject to the adoption of the Interim Council resolution required by subsection (c), is ratified and confirmed. The Committee substituted the term "Interim Council" for the term "General Council."

Paragraph (2) provides that the Indian Reorganization Act of 1934 shall apply to the Yurok Tribe.

Paragraph (3) directs the Secretary promptly to consult with the Select Committee on Indian Affairs, the House Insular and Interior Affairs Committee and any other appropriate committee and, within 30 days of enactment, appoint five individuals to compromise [sic] the Yurok Transition Team. Since the Interim Council will not be nominated or elected until after preparation of the Settlement Roll and election of options, a process that will take over one year, a Transition Team to aid the Yurok Tribe's organizational process is essential.

A key function of the Yurok Transition Team is to provide counseling to persons who are or may be eligible for inclusion in the Hoopa-Yurok Settlement Roll with respect to inclusion in the Settlement Roll, the advantages and disadvantages of each of the settlement options available under section 6, and related issues. In particular, the Yurok Transition Team must counsel people concerning the current or potential benefits which will or may be derived by membership in the Yurok Tribe or the Hoopa Valley Tribe, and from connections with the Yurok or Hoopa Valley reservation. This must include discussion of any possible effect on the future tribal membership of children of individuals who may elect the option of sections 6(c) and 6(d). However, this paragraph does not suggest, and the Committee does not intend that any part of this Act change the federal Indian status of any person, for purposes of programs and benefits in which membership in a federally recognized Indian tribe is not a prerequisite, regardless of the option elected. Nor does this Act end federal restrictions that may exist as to

any allotted or unallotted trust land or resources. As noted elsewhere, the option provided by section 6(d) is not a termination provision; and it should not be portrayed as such; the subsection merely offers a lump-sum payment to persons on the Settlement Roll who wish to have no future interest or right in the tribal, communal, or unallotted land, property, resources, or rights of the Hoopa Valley Reservation or the Yurok Reservation or the Hoopa or Yurok tribes.

Subsection (b) provides for the creation of an Interim Council for the Yurok Tribe of five members to represent the Yurok Tribe in the implementation of the Act and to act as the tribal governing body until a tribal council is elected under a constitution adopted pursuant to this section.

Subsection (c), paragraph (1), provides that the Secretary, within 30 days of the deadline for election of options, shall prepare a list of all adults on the Settlement Roll who elected the Yurok Membership option who will constitute the eligible voters of the tribe for organizational purposes. The Secretary must send them notice of date, time, purpose, and order of procedure of the general council meeting to be scheduled pursuant to paragraph (2).

Paragraph (2) provides that, within a set time after such notice, the Secretary shall convene a general council meeting of the Yurok Tribe on or near the Yurok Reservation. The business of such meeting is to nominate candidates for election to the Interim Council. Only persons on the list prepared under paragraph (1) are eligible for nomination. As amended by the Committee the resolution waiving claims against the United States may be executed by the Interim Council based upon the proxies received from persons electing tribal membership.

Paragraph (3) provides that, within 45 days after the general council meeting, the Secretary shall conduct an election for the Interim Council from among the persons nominated. Absentee balloting and write-in voting is to be permitted. The Secretary must give the eligible voters adequate notice of the election.

Paragraph (4) requires the Secretary to certify the results of the election and to convene an organizational meeting of the newly elected Interim Council.

Paragraph (5) provides that vacancies on the Council shall be filled by a vote of the other members.

Subsection (d), paragraph (1), provides that the Interim Council shall have no powers except those conferred by this Act.

Paragraph (2) provides that the Council shall have full authority to secure the benefits of Federal programs for the tribe and its members, including those administered by the Secretary of the Interior and the Secretary of Health and Human Services and shall have authority to execute the necessary waiver of claims against the United States, and consent to allocation of the escrow funds to the Settlement Fund.

Paragraph (3) provides that the Council shall have such other powers as the Secretary normally recognizes in an Indian tribal governing body, except that it may not legally or contractually bind the tribe for a period in excess of two years from the date of their election. The Committee's amendment revised this language to provide that any contract of more than two years duration will be subject to disapproval by the Secretary of the Interior under limited circumstances.

Paragraph (4) provides that the Interim Council shall appoint a drafting committee which shall be responsible for the development of a draft constitution for submission to the Secretary.

Paragraph (5) provides that the Interim Council shall be dissolved upon election of the initial governing body under such constitution when adopted or at the end of two years after their installation, whichever occurs first.

Subsection (e) provides that the Secretary, upon the request of the Interim Council and the submission of the draft constitution, shall take all steps necessary under the provisions of the Indian Reorganization Act for the adoption of a tribal constitution and the election of the initial tribal council under such constitution when adopted. The Committee recognizes

that the Yurok Tribe has a sovereign right to select tribal membership provisions for its constitution. The Tribe may prohibit the dual enrollment of Yurok tribal members in other Indian tribes, for example, as many other tribes do. Both because it is the Yurok Tribe's right to determine its membership criteria and because the Tribe will have to live with the consequences of its decision, the Committee is reluctant to require inclusion of specific membership provisions. Nevertheless, the Committee hopes and presumes that children born after the date of enactment of this Act (who of course are not included in the Hoopa-Yurok Settlement Roll) and who meet the applicable Indian blood requirement, if any, established by the Yurok Tribe, but whose parents may have elected the option of section 6(d) will nevertheless be favorably considered for enrollment in the Yurok Tribe although their parents may not be members of the Yurok Tribe. The Committee is concerned that an injustice will occur if the Yurok Tribe prohibits the enrollment of children born after the date of enactment of this Act who possess the necessary blood quantum required by the Yurok Tribe's constitution, but whose parents elected the lump-sum option instead of enrollment in the Yurok Tribe.

It is not intended by this section that the Indian Reorganization Act shall provide the only means by which the Yurok Tribe may be organized. Nor does the Committee intend that the Constitution prepared by the drafting committee pursuant to subsection (e) is the only one upon which the Secretary may conduct an election in the future.

SECTION 10 - ECONOMIC DEVELOPMENT

The amendment added a new Section 10 directing that a plan for economic self-sufficiency for the Yurok Tribe be developed and submitted to Congress by the Secretary of the Interior, in conjunction with the Interim Council of the Yurok Tribe and the Yurok Transition Team, to determine the long-term needs of the Tribe. The Secretary is expected to seek

the assistance and cooperation of the secretaries of Health and Human Services and other federal agencies. The Committee is aware that the Yurok Tribe has not received the majority of services provided to other federally recognized tribes. As a result, it lacks adequate housing and many of the facilities, utilities, roads and other infrastructure necessary for a developing community. In addition, the Committee is aware that many of the road, realty and fisheries management services on the "Addition" have been provided in the past by the Hoopa Valley Tribe. The Committee is, therefore, concerned about how the Bureau of Indian Affairs plans to address these needs, and directs the Secretary to work with the Yurok Tribe to develop proposed solutions to these and other related problems. The Committee is specifically interested in the feasibility and cost of constructing a road from U.S. Highway 101 to California Highway 96. It is also concerned that the Department of the Interior does not currently have adequate land records and surveys of the "Addition". The Committee, therefore, expects that the Department will conduct all necessary surveys to ascertain the legal status of such lands. It also expects the plan to address such things as the number of additional federal employees required to service the Yurok Tribe and placement of the Tribe's facilities construction needs on the BIA, IHS, and other federal agency construction priority lists. The Committee wishes to clarify, however, that the development of this plan should in no way delay the provision of services to the Yurok Tribe and/or the construction of federal and tribal facilities.

SECTION 11 - SPECIAL CONSIDERATIONS.

This Section was designated Section 10 in S. 2723, as introduced.

Subsection (a) provides that the 20-acre land assignment on the Hoopa Valley Reservation made by the BIA in 1947 to the Smokers family shall continue in effect and may pass by descent or devise to relatives of one-fourth

or more Indian blood of members domiciled on the assignment as of the date of enactment.

Subsection (b) provides that within 90 days after enactment, the Secretary shall conduct elections for the Resighini, Trinidad, and Big Lagoon, Rancherias concerning merger with the Yurok Tribe. If a majority of those voting approves, the Rancherias should fully merge their lands, assets and membership with the Yurok Tribe. The Secretary is to publish in the Federal Register notice of the effective date of any such merger. The Committee deleted reference to Blue Lake, Smith River, Elk Valley, and Tolowa Rancherias on the grounds that these rancherias are not historically of Yurok origin. A new subsection (c) was added to provide protection for existing property rights.

SECTION 12 - KLAMATH RIVER BASIN FISHERIES TASK FORCE

Subsection (a) amends the Act of October 27, 1986, establishing the Klamath River Basin Fisheries Task Force, by providing for a representative of the Yurok and of the Karuk Tribes on such task force. The Secretary is to appoint the first Yurok representatives who will serve until the Yurok Tribe is organized and appoints its own representative.

Subsection (b) provides that the term of the initial Yurok and Karuk members appointed shall be for that time remaining on the terms of existing task force members and, thereafter, as provided by the provisions of the 1986 Act.

SECTION 13 - TRIBAL TIMBER SALES PROCEEDS USE

Section 11 amends section 7 of the Act of June 25, 1910 (25 U. S. C. 407) by making clear that timber sales proceeds from Indian reservations shall be used only for the benefit of the tribe or tribes located on such reservations and their members.

In the *Short* case, the Circuit Court interpreted section 407, as applicable to the facts and circumstances of that case, in a manner which could cause mischief if applied to other Indian tribes and other facts and circumstances. The amendment simply makes clear that revenue from tribal timber resources are to be used solely for the tribes located on such reservation and, through such tribes, their members.

SECTION 14 - LIMITATIONS OF ACTIONS; WAIVER OF CLAIMS

A statute of limitations is very necessary to avoid uncertainty about the possible applicability of 28 U.S.C. §§ 2501 (six years), 2409a (12 years) and *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226 (1985) (no statute of limitation). The Committee finds that the periods provided in this section are reasonable under the circumstances. Further, the limitations here are rationally related to fulfillment of Congress' unique obligation to Indian tribes and individuals. E.g., *Littlewolf* v. *Hodel*, 681 F. Supp. 929 (D.D.C. 1988).

Subsection (a) provides that any claim challenging the constitutionality of this Act as a taking under the 5th Amendment of the Constitution shall be brought in the United States Claims Court under sections 1491 and 1505 of title 28, United States Code.

Subsection (b), paragraph (1), provides that any such suit by an individual, entity, or tribe other than the Hoopa Valley or Yurok Tribes, shall be barred unless brought within 210 days of the date of partition of the joint reservation or 120 days after the date for the election of options as established by section 6(a)(3), whichever is later.

Paragraph (2) provides that any such claim by the Hoopa Valley Tribe must be brought within 180 days of enactment or be barred.

Paragraph (3) provides that any such claim by the Yurok Tribe must be brought within 180 days of the date of

the general council meeting under section 9(c)(2)(A) or be barred.

Again, the Committee reiterates its conclusion that no individual or tribe has a vested, constitutionally protected right in the lands and resources of the joint reservation. The statute of limitations in this subsection are simply included to bring about some certainty and out of an abundance of caution.

Subsection (c) provides that the Secretary shall make a report to the Congress on any final judgment in any litigation brought pursuant to this section together with any recommendations deemed necessary. New language was added by the Committee to provide for a stay of payment of any judgment that might be rendered against the United States, in order to provide time for the Department to provide Congress with a report.

SECTION 15 - HEALTH ISSUES

A new Section 15 was added to provide for clean up of dump sites on the newly established Yurok Reservation. The Secretary of Health and Human Services and the Secretary of the Interior are directed to enter into a memorandum of understanding with Humboldt County for the clean up and maintenance of these sites. Costs are estimated at approximately $40,000 for the clean up and $8,000 per year for maintenance.

COST AND BUDGETARY CONSIDERATIONS

The authorization levels and purposes for which funds may be expended set forth in S. 2723 are identical to the companion bill, H.R. 4469, reported out of the House Committee on Interior and Insular Affairs on August 10, 1988. The cost estimate for H.R. 4469, and thus S. 2723, are set forth below:

CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

SEPTEMBER 9, 1988.

1. Bill number: H.R. 4469.
2. Bill title: Hoopa-Yurok Settlement Act.
3. Bill status: As amended and ordered reported by the House Committee on Interior and Insular Affairs, August 10, 1988.
4. Bill purpose: This bill would, if certain conditions are met, partition specified joint Indian reservation lands in northern California into the Hoopa Valley Reservation and the Yurok Reservation. It would also establish the Hoopa-Yurok Settlement Fund, and require the Secretary of the Interior to deposit into it escrow funds and interest earnings from designated trust accounts. The bill would require the Secretary to make distributions from the fund into trust accounts for the Hoopa Valley and Yurok tribes, and to make payments to eligible individuals electing certain tribal membership options. The bill authorizes the appropriation of $10 million to be deposited into the Settlement Fund for the purpose of making lump-sum payments to such individuals.

The bill would also require the Secretary of the Interior to administer the partitioning of the lands and the two tribes. This responsibility would include specifying the reservation lands and boundaries, preparing an eligibility roll and final Settlement Roll, providing for the election of a settlement option by those on the Settlement Roll and establishing them as tribal members, organizing a general council meeting of the Yurok Tribe, and providing for the election of an Interim council for that tribe. The bill permits the Secretary to use up to $5 million of Bureau of Indian Affairs (BIA) funds to acquire lands or interest in lands for the Yurok Tribe or its members.

5. Estimated Cost to the Federal Government:

[By fiscal year, in millions of dollars]

	1989	1990	1991	1992	1993
Estimated authorization level	10	(1)			
Estimated outlays	(1)	10			

[1] Less than $500,000

The costs of this bill fall within budget function 450.

Basis of Estimate

The estimated costs of this bill reflect the authorization and distribution of $10 million for lump-sum payments of $20,000 each to eligible individuals choosing not to become members of either the Hoopa Valley or Yurok Tribes. Based on information provided by the BIA, the number of individuals expected to choose this option is at least 500, the number that would exhaust $10 million authorization.

Additional lump-sum and other payments required under this bill would come out of the Settlement Fund, which would have a balance of more than $50 million. The Settlement Fund money is currently being held in escrow and, in the absence of legislation, would be available for distribution upon resolution of a pending court claims [sic]. The estimate assumes that the bill would not significantly affect the timing or amount of spending of the amounts currently held in escrow relative to current law.

The administrative task associated with partitioning the reservation and the tribes are estimated to result in additional costs of approximately $500,000 in the first two fiscal years after enactment. We estimate no additional costs for land acquisition, based on information provided by the

BIA that the agency would not exercise the authority provided in the bill for such activity. Other provisions of the bill are not expected to result in significant additional cost.

6. Estimated cost to State and local governments: None.

7. Estimated comparison: None.

8. Previous CBO estimate: None.

9. Estimate prepared by: Carol Cohen.

10. Estimate approved by: C.G. Nuckols (for James L. Blum, Assistant Director for Budget Analysis).

REGULATORY IMPACT STATEMENT

Paragraph 11(b) of rule XXVI of the Standing Rules of the Senate requires each report accompanying a bill to evaluate the regulatory and paperwork impact that would be incurred in carrying out the bill. The Committee believes that S. 2723, as amended, will have a minimal impact on regulatory or paperwork requirements.

EXECUTIVE COMMUNICATIONS

The Committee received the following statements from the Department of the Interior and the Department of Justice at its hearing on September 14, 1988:

STATEMENT OF ROSS O. SWIMMER, ASSISTANT SECRETARY FOR INDIAN AFFAIRS, DEPARTMENT OF THE INTERIOR

Good morning Mr. Chairman and members of the Committee. I am pleased to be here today to discuss S. 2723, a bill "To partition certain reservation lands between the Hoopa Valley Tribe and the Yurok Indians, to clarify the use of tribal timber proceeds, and for other purposes."

We object to enactment of S. 2723 unless it is amended to meet our concerns, especially with regard to the

deletion of an unjustified Federal contribution of $15 million, we would recommend that the President veto the bill.

Since the 1950's there has been a dispute among the Indians of the Hoopa Valley Reservation in Northern California as to who is entitled to share in the timber proceeds from the "Square" portion of that Reservation. (The Square is in Hoopa Valley, and the "Extension" follows the Klamath River to the Pacific.) Following a 1958 opinion of the Solicitor's Office that the Hoopa Valley Tribe was entitled to receive all the timber income, individual Indians, now numbering some 3800 of Yurok and other tribal groups, brought suit in 1963 for damages for their exclusion from shares in the income (*Jessie Short, et al. v. United States*, No. 102-63, United States Claims Court). The Yurok Tribe has never organized itself as a political or corporate entity, and thus has no spokesmen or official representatives.

At the time the litigation was begun, the Square was treated as a separate reservation from the Extension. In 1973, the Court of Claims held that there was but a single reservation. Subsequently, the Court ruled that all the "Indians of the Reservation" are entitled to participate in per capita distributions of the income from the timber on the unallotted (tribal) lands of the Square. From 1974-1978 efforts were made to determine the identity of the "Indians of the Reservation" and to mediate a settlement.

In 1979, the Government moved to substitute the Yurok Tribe for the 3800 individual plaintiffs, and the Hoopa Valley Tribe, as intervenor, moved to dismiss the case. In 1981, the Court of Claims denied the motions and ruled that successful plaintiffs would be determined on standards similar to the standards for membership in the Hoopa Valley Tribe. The Federal Circuit Court of Appeals affirmed. The petitions for certiorari filed by the Hoopa Valley Tribe and 1200 of the plaintiffs, the third unsuccessful effort to obtain certiorari in the case, were denied by the Supreme Court on June 19, 1984.

In 1980 another suit was filed (*Lillian Blake Puzz, et al. v. United States et al.*, No. C-80-2908 TEH, U.S.D.C., N.D.

California) by six individuals claiming to be Indians of the Hoopa Valley Indian Reservation whose rights to participate in reservation administration and to benefit from the reservation's resources were allegedly denied by the Federal Government in violation of their constitutional rights to equal protection.

Plaintiffs' claims were initially premised on individual Indian ownership of the unallotted reservation resources, although they later also asserted that all "Indians of the Reservation" constituted one tribe, and that all individual Indians should have a vote in that tribe's government. The Government's position was that the reservation was created for Indian tribes, not individual Indians, and that the recognition of Indian tribes is a political question for determination by the Congress and the Executive Branch and such determinations are not reviewable by the courts.

On April 8, 1988, the court issued an order in which Judge Henderson agreed with the Government that the reservation was created for Indian tribes except that the Hoopa Valley Reservation was not created for a single tribe but for "all tribes which were living there and could be induced to live there." Order at p. 7. The court concluded that Federal recognition of the Hoopa Tribe did not give the tribe exclusive control over any reservation lands and resources.

The court also found that the individual plaintiffs have standing to litigate reservation management issues and that the 1864 statute authorizing the creation of the reservation imposed a trust responsibility on the U.S. Government extending to all the Indians of the Reservation.

Having addressed these issues the court ordered three specific actions:

1. The Federal defendants may lawfully allow the Hoopa Business Council (HBC) to participate in reservation administration, and the HBC may lawfully conduct business as a tribal body sovereign over its own members, and, as an advisory body, participate in reservation administration;

2. Federal defendants shall not dispense funds for any project or services that do not benefit all Indians of the reservation in a non-discriminatory manner. Federal defendants shall exercise supervisory power over reservation administration, resource management, and spending of reservation funds, to ensure that all Indians receive the use and benefits of the reservation on an equal basis. Specifically, Federal defendants shall not permit any reservation funds to be used for litigation among Indians or tribes of the reservation.

3. To fulfill the requirements of this Order, Federal defendants must develop and implement a process to receive and respond to the needs and views of non-Hoopa Valley tribal members as to the proper use of reservation resources and funds.

On June 7, 1988, we submitted to the court a plan of operation for the management of the Hoopa Valley Reservation resources, as required by the court's April 8, 1988 order. On September 2, 1988 the court denied plaintiffs' motion to strike the plan, although it emphasized that the issues raised in that motion would have to be addressed if this legislation is not enacted and the court is left with the task of approving a final long-term plan for the management of the reservation.

Obviously, the District Court's orders are changing the management of the reservation and its resources. However, we do not believe that they provide the appropriate vehicle for a satisfactory permanent resolution to all the problems on the Hoopa Valley Indian Reservation. We believe that partitioning the communal reservation and encouraging the Yuroks to organize as a tribe would lead to more satisfactory results.

Now I would like to address our major concerns regarding S. 2723. I have attached our technical concerns to my written statement.

S. 2723 partitions the Hoopa Valley Reservation only if the Hoopa Valley tribe passes a resolution waiving any claims they may have against the United States arising out of

the provisions of the Act. The resolution must be presented to the Secretary within 60 days of enactment of the Act. The Secretary then publishes the resolution in the Federal Register and the existing communal reservation becomes two reservations. The "square" would become the Hoopa Valley Reservation and the "extension" would become the Yurok Reservation. Additional forest service land would be added to the Yurok Reservation and an authorization of $5 million would be provided for the purchase of additional land for the Yurok Reservation.

We do not believe that expanding the reservation is necessary at this time and strongly oppose the addition of Federal money for this purpose. Currently, there are approximately 400 Yuroks living on the "Extension" which includes 5,373.9 acres (including tribal land and allotments). We recommend that this provision be deleted.

Upon enactment of the act, the existing $50 million communal escrow account is to become the basis of a settlement fund. An additional $10 million is authorized to be appropriated to add to the fund. We do not believe the settlement fund should be established until the communal reservation is partitioned. Further, we believe that the bill should not become effective (except for section 12) until the Hoopa Valley Tribe adopts and sends to the Secretary, the resolution called for in section 2(a).

We strongly oppose the addition of Federal money to this fund and believe that the distribution of the fund should be used for making the payments under section 6 and giving any remaining funds to the Yurok Tribe. The partition of the communal reservation and the commu[n]al escrow account should not require the addition of Federal funds. If the amount in the escrow fund is not sufficient, we believe the per capita amounts available to individuals under the bill should be changed so that the escrow funds cover those payments. We believe the bill should be amended to specify that if adequate funds are not available in the Settlement fund to make the payments, such payments shall be pro-rated accordingly. Any funds remaining in the Settlement Fund

after all payments have been made or provided for, should be held in trust for the Yurok Tribe.

The Secretary is to prepare a settlement roll of all persons who can meet the criteria established by the Federal court in the *Short* case for qualification as an "Indian of the Reservation". The Secretary is to provide each eligible person the opportunity to choose one of the following options: 1) become a member of the Hoopa Valley Tribe (if appropriate criteria are met); 2) become a member of the Yurok Tribe and receive a $3000 payment; or 3) elect to receive a payment of $20,000 and give up all rights to the reservation and all rights to membership in the Yurok Tribe.

Parents and guardians of children on the Settlement Roll under the age of 18 would choose an option for their child.

Although we do not object to the provision allowing parents or guardians making the choice for minor children, we believe that the children's payments should be held in trust until they reach age 18. The Settlement Fund could remain in effect and draw interest until each minor reaches age 18 and receives their payments.

We further recommend that the Settlement Roll be established as of the date of the partition of the communal reservation rather than as of the date of enactment of the Act. This could assure that the roll would include all persons having an appropriate interest at the time of the partition. Anyone born after the partition would of course, not have a interest in the previous single communal reservation.

Section 9 provides for the organization of the Yurok Tribe under the Indian Reorganization Act. Within 45 days of the official notice the Secretary shall convene a general council meeting of the eligible voters of the Yurok Tribe. The General Council would vote on the adoption of a resolution waiving any claim the Tribe may have against the United States arising out of the provisions of this Act and to nominate candidates for an interim council. The general council would elect an Interim Council to represent the tribe until a constitution and tribal council are in place, or for 2

years, which ever is the shorter period. The Interim Council would appoint a drafting committee to draft a tribal constitution and request the Secretary to authorize an election to vote on the constitution.

The time required for the Secretary to provide notice, call general council meetings, and hold elections is unreasonable. The Bureau would not be able to meet such requirements. Amended requirements are included in our technical amendments attached to my written statement.

We would also commend [sic] that the tribe be required to have a constitution and an elected tribal council before they enter into contracts or receive grants from the Federal Government. Under the bill the Interim Council could enter into a contract and then after two years the council would be dissolved. We do not believe this is either good management or fair to the tribal members who m[a]y receive services under the contract.

Section 13 provides for statute of limitations for any claim brought against the United States challenging the partition of the communal reservation under this act. We defer to the Department of Justice on these provision[s].

Mr. Chairman, we urge the Committee to amend the bill to meet our concerns, particularly with respect to the appropriation authorization of $15 million. I have attached a number of technical concerns to my written statement.

This concludes my prepared statement. I will be pleased to answer any questions the Committee may have.

RECOMMENDED AMENDMENTS TO S. 2723

Section 1(b)(7) defines Karuk Tribe as organized after a special election conducted by the United States Department of the Interior, Bureau of Indian Affairs. The Bureau of Indian Affairs did not hold a special election. We recommend the following amendment:

Section 1(b)(7) line 16 (page 3) after "constitution" delete "after a special election conducted by the United States

Department of the Interior, Bureau of Indian Affairs" and change "April 18" to "Aprill [sic] 6".

Section 2(c)(3)(A) provides authority for the Secretary to take additional land into trust status for the Yurok Tribe. We recommend that the provision clarify that the land would be part of the Yurok Reservation. We recommend the following amendment:

Section 2(c)(3)(A) line 8 (page 7) add at the end "and that such lands may be declared to be part of the Yurok Reservation".

Section 4(a) establishes a Settlement Fund upon enactment of this act. We believe the fund should be established upon the partition of the reservation. We recommend the following amendment.

Section 4(a) line 8 (page 9) delete "enactment of this Act" and insert "the partition of the Hoopa Valley Reservation under section 2 of this act".

Section 4(a)(2) permits the Hoopa Valley Tribe to use up to $3.5 million annually out of the income or principal of the Settlement Fund for tribal, non-per capita purposes. We believe the Yurok Tribe should also be able to draw this account. We recommend that Sec. 4(a)(2) line 12 (page 9) be amended as follows:

> "(2) Until the distribution is made to the Hoopa Valley and Yurok Tribes under subsection (c), the Secretary may distribute to both tribes an amount not to exceed income and interest earned less 10 per cent for the current operating year out of the Settlement Fund. These funds may be used for tribal purposes and may not be distributed as per capita payments."

Section 4(b) on page 9, line 23 should be amended by striking out "pending" and inserting in lieu thereof "pending payments under section 6 and".

Section 4(c) line 3 (page 10) and 4(d) line 13 refer to the wrong paragraph. Section 6(a)(3) should be changed to "6(a)(4)".

Subsections (c), (d), and (e) of section 4 on page 10, line 1 through page 11, line 6 should be deleted.

Section 5 provides for the Secretary to establish a Settlement Roll of eligible persons living on the date of enactment of this Act. We recommend that the roll be established as of the date of the partition of the reservation to avoid any possible problems regarding the status of a person born between the time of enactment of the Act and the partitioning of the reservation. We also recommend that the Secretary be given more time to complete the necessary procedures for establishing the roll. The following amendments are recommended:

Section 5(a)(A) line 20 (page 11) change "of enactment of this Act" to "of the partition under section 6(a)".

Section 5(b) line 24 (page 11) change "thirty" to "one hundred and twenty".

Section 5(d) line 22 (page 11) change "one hundred and eighty days" to "two hundred and forty days".

Section 6 requires the Secretary to notify all eligible persons of the options available to them under the act. We believe it should be clear that each individual must choose one option. We also recommend that notice be given by certified mail rather than by registered mail. We recommend the following amendments:

Section 6(a) line 23 (page 13) change "registered" to "certified".

Section 6(a) line 1 (page 14) after "elect" insert "one of".

Section 6(a)(3) (page 14) should be amended to designate paragraph "(3)" as "(3)(A)" and add a new subparagraph "(B)" as follows:

> "(B) The funds entitled to such minors shall be held in trust by the Secretary until the minor reaches age 18. The Secretary shall notify and provide payment to such persons including all interest accrued."

Section 6(b) line 3 (page 15) "March 21" should be "March 31".

Section 6(b)(3) requires the Secretary to assign a blood quantum to persons electing to become enrolled members of the Hoopa Valley Tribe. We recommend the following clarifying amendment:

Section 6(b)(3) line 23 (page 15) should be amended to read: "The Secretary shall determine the quantum of "Indian blood" or "Hoopa Indian blood", if any, of each person enrolled in the Hoopa Valley Tribe under this subsection pursuant to the criteria established in the March 31, 1982 decision of the U.S. Court of Claims in the case of *Jessie Short et al. v. United States*, (Cl. Ct. No. 102-63)".

Section 6(c)(2) line 17 (page 16) should be amended for clarity and consistency with subsection (b)(3). After "shall" delete "assign each person that quantum of "Indian blood" as may be determined" and insert "determine the quantum of "Indian blood", if any,".

Section 6(c)(3) lines 22 and 23 (page 16) should be amended to read as follows:

"(c) The Secretary shall pay (subject to section 7 of the Act of October 19, 1973, as amended (25 U.S.C. 1407)) to each person".

Section 9 provides for a procedure for the organization of the Yurok Tribe. We believe an interim council should be elected for the primary purpose of drafting a constitution. The Secretary should provide services until the tribe has a constitution and an officially elected tribal council. We recommend the following amendments:

Section 9(c) line 10 (page 19) change "30" to "60".

Section 9(c)(3) line 12 (page 20) change "45" to "60".

Section 9(d)(2) line 6 (page 21) should be amended as follows:

> "(2) The Interim Council shall represent the tribe to assist the Secretary in determining the needs and appropriate programs for the tribe. The Council shall be responsible for determining appropriate use of the funds available to the tribe under section 4(a) of this act."
>
> Delete paragraph "(3)" and renumber "(4)" as "(3)".

Renumber paragraph "(5)" as "(4)" and on line 1 (page 22) delete the words "or at the end of two years after such installation, whichever occurs first".

Section 10 allows the merger of existing Rancherias with the Yurok Tribe. There is no Tolowa Rancheria so that reference should be deleted. We also recommend that since the names listed in this section are names of Rancherias and not names of Tribes that the section be amended to reflect that difference.

Section 10(b) line 23 (page 22) should be amended to add "any of the following Rancherias at" after "members of". Delete "the" after the word "of".

Section 10(b) line 24 (page 23) after "Elk Valley" delete "or Tolowa Rancherias".

Section 11 provides for the addition of a member of the Karok and Yurok Tribes to the Klamath River Basin Fisheries Task Force.

The Secretary is to appoint the member for the Yurok Tribe until the Tribe is recognized. Since the tribe is already Federally recognized we recommend this provision be changed to refer to the tribe's organization.

Section 11(b) line 23 (page 23) delete "established and federally recognized" and insert "organized".

Section 11(b) line 2 (page 24) change "recognized" to "organized".

Add a new section 14 at the end of the bill as follows:

"Sec. 14. This Act (except sections 2(a) and 12) shall be effective upon partitioning of the reservation as provided in section 2(a). Sections 2(a) and 12 shall be effective upon enactment."

STATEMENT OF RODNEY R. PARKER, ASSOCIATE DEPUTY ATTORNEY GENERAL, U.S. DEPARTMENT OF JUSTICE

Mr. Chairman and Members of the Committee, on behalf of the Department of Justice, I am pleased to have this opportunity to present our views on S. 2723, legislation to

partition reservation lands between the Hoopa Valley Tribe and the Yurok Indians, as introduced by Senator Cranston. This bill, which is identical to the amended version of H.R. 4469 introduced by Congressman Bosco, satisfies our litigation concerns. However, because of budgetary and other policy concerns, we defer to the Department of the Interior for the Administration's position on the bill.

In 1876, a 12-mile square tract of land in Northern California (the Square), occupied mainly by Hoopa Indians, was set aside by President Grant as the Hoopa Valley Indian Reservation. In 1891, President Harrison extended the boundaries of the Reservation to include the adjoining 1-mile wide strip of land on either side of the Klamath River (the Addition or Extension) which was occupied mostly by Yurok Indians.

Beginning in the 1950's, the Hoopa Valley Tribe, a federally recognized and organized tribe, began receiving proceeds from the harvesting of timber from the Square. Some of the proceeds from the timber harvests were distributed on a per capita basis to individual members of the Hoopa Valley Tribe. This prompted suits by other Indians who were not members of the tribe and thus did not receive per capita payments. *Short v. United States*, No. 102-63, Cl.Ct.; *Ackley v. United States*, No. 460-78, Cl.Ct.; *Aanstadt v. United States*, No. 146-85L, Cl.Ct.; *Giffen v. United States*, No. 746-85L, Cl.Ct.

In these cases, the United States Claims Court held, contrary to the government's position, that the Square and the Extension were a single reservation and that all Indians of the Reservation were entitled to share in a money judgment based on past distributions of individualized monies, i.e. the per capita payments. Since the initial ruling in 1973, efforts have been made to identify the qualified plaintiffs, to settle the litigation and to mediate the dispute which is focused on the conflicting positions of the organized Hoopa Valley Tribe and the federally recognized but not organized Yurok Tribe.

S. 2723 would provide for the partition of the Hoopa Valley reservation into two separate reservations, to be held

in trust by the United States for the Hoopa Valley Tribe and the Yurok Tribe, respectively. The bill also provides for the establishment and distribution of a Settlement Fund for eligible individuals.

The Department of Justice has worked with Congressman Bosco's staff to draft legislation that satisfied our litigation concerns. S. 2723, which is identical to the amended version of H.R. 4469, would, in general, satisfy our litigation concerns.

We have, however, two remaining concerns with the bill. Our first concern is clarification that no Fifth Amendment taking is intended by the sections providing for the contribution of tribal monies to the Settlement Fund. The bill already provides for a waiver of claims by the Hoopa Tribe and, under certain circumstances, the Yurok Tribe. While we understand the waiver language as already evidencing tribal consent, we think a provision requiring express tribal consent could provide a clearer acknowledgment by the tribal government that no taking has occurred. We therefore suggest that section 2(a)(2)(A) be changed to read as follows:

> (2)(A) The partition of the joint reservation as provided in this subsection shall not become effective unless, within 60 days after the date of the enactment of this Act, the Hoopa Valley Tribe shall adopt, and transmit to the Secretary, a tribal resolution:
>
> > (i) waiving any claim such tribe may have against the United States arising out of the provisions of this Act, and
> >
> > *(ii) affirming tribal consent to the contribution of Hoopa Escrow monies to the Settlement Fund, and for their use as payments to the Yurok Tribe, and to individual Yuroks, as provided in this Act.*

We likewise suggest that section 9(c)(2)(A) be changed to read as follows:

(A) the adoption of a resolution, by a vote of not less than two-thirds of the voters present and voting:

(i) waiving any claim the Yurok Tribe may have against the United States arising out of the provision of this Act, and

(B) [sic] (ii) affirming tribal consent to the contribution of Yurok Escrow monies to the Settlement Fund, and for their use as payments to the Hoopa Tribe, and to individual Hoopa members, as provided in this Act.

Our second concern involves section 13(c)(2) of the bill, which provides that, in the event of a judgment against the United States based on a Fifth Amendment taking, the Secretary of the Interior shall submit a report to Congress recommending possible Congressional modifications to the bill. Pursuant to this section, Congress could change the nature of the act that constituted a taking, and thus make payment for a permanent taking by the United States unnecessary. In order to ensure that payment is not made in the event that Congress takes action to make the payment unnecessary, we suggest that the following provisions be added to section 13(c)(2) of the Act:

> Notwithstanding the provisions of 28 U.S.C. 2517, any judgment entered against the United States shall not be paid for 180 days after the entry of judgment; and, if the Secretary of the Interior submits a report to Congress pursuant to this section, then payment shall be made no earlier than 120 days after submission of the report.

The bill's remaining provisions largely involve budget and policy matters and we defer to the Department of the Interior on them. I would be pleased to answer any questions you might have.

CHANGES IN EXISTING LAW

In compliance with subsection 12 of Rule XXVI of the Standing Rules of the Senate, the Committee notes that changes in existing law made by the bill are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, and existing law in which no change is proposed is shown in roman):

ACT OF JUNE 25, 1910, AS AMENDED

* * * *

[Sec. 7. The timber on unallotted lands of any Indian reservation may be sold in accordance with the principles of sustained yield, or in order to convert the land to a more desirable use, under regulations to be prescribed by the Secretary of the Interior, and the proceeds from such sales, after deductions for administrative expenses pursuant to the Act of February 14, 1920, as amended (25 U.S.C. 413), shall be used for the benefit of Indians who are members of the tribe or tribes concerned in such manner as he may direct.]

Sec. 7. Under regulations prescribed by the Secretary of the Interior, the timber on unallotted trust land in Indian reservations or on other land held in trust for tribes may be sold in accordance with the principles of sustained-yield management or to convert the land to a more desirable use. After deduction, if any, for administrative expenses under the Act of February 14, 1920 (41 Stat. 415; 25 U.S.C. 413), the proceeds of the sale shall be used -

(1) as determined by the governing bodies of the tribes concerned and approved by the Secretary or

(2) in the absense [sic] of such a governing body, as determined by the Secretary for the tribe concerned.

* * * *

ACT OF OCTOBER 27, 1986
(100 Stat. 3086; 16 U. S. C. 460ss)

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Sec. 4. Klamath River Basin Fisheries Task Force

* * * *

(c) Membership and appointment. The Task Force is composed of [12] *14* members as follows:

* * * *

(11) A representative of the Karuk Tribe, who shall be appointed by the governing body of the tribe.

(12) A representative of the Yurok Tribe, who shall be appointed by the Secretary until such time as the Yurok Tribe is established and Federally recognized, upon which time the Yurok Tribe shall appoint such representative beginning with the first appointment ordinarily occurring after the Yurok Tribe is recognized. History Aboriginal Tribers [sic] *and Lands of Northern California.*

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